DOCUMENT RESUME

ED 455 596 EA 031 172

AUTHOR	Camp, William E., Ed.; Connelly, Mary Jane, Ed.; Lane, Kenneth E., Ed.; Mead, Julie F., Ed.
TITLE	The Principal's Legal Handbook. Second Edition.
INSTITUTION	Education Law Association, Dayton, OH.
ISBN	ISBN-1-56534-103-1
PUB DATE	2000-00-00
NOTE	396p.; For first edition, see ED 354 606.
AVAILABLE FROM	Education Law Association, 300 College Park, Dayton, OH 45469. Tel: 937-229-3589.
PUB TYPE	Books (010) -- Guides - Non-Classroom (055)
EDRS PRICE	EDRS Price MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	Affirmative Action; Child Abuse; Constitutional Law; *Court Litigation; Desegregation Litigation; Educational Finance; Elementary Secondary Education; Fair Use (Copyrights); Federal Courts; Federal Legislation; *Principals; *School Law; Sexual Harassment; *Special Education; State Church Separation; State Courts; State Legislation; *Student Rights; *Teacher Rights
IDENTIFIERS	Equal Access Act 1984; Family Educational Rights and Privacy Act 1974; Family Law; Individuals with Disabilities Education Act; Ohio; Rehabilitation Act 1973 (Section 504)

ABSTRACT

This handbook for elementary and secondary school principals contains several chapters on topics important to building level administrators. Each chapter summarizes relevant state and federal court decisions and statutes, concluding with recommendations for practice. The handbook is divided into four sections: students and the law, special education and the law, teachers and the law, and school and the law. The first section contains seven chapters on topics covering the First (expression), Fourth (search and seizure), and Fourteenth (procedural and substantive due process) Amendments; student discipline; child abuse; student-to-student sexual harassment; and student records. The second section contains seven chapters on topics that cover the federal laws protecting students with disabilities and recent relevant cases in which the courts have interpreted those statutes as they apply to student discipline and transition, parents' rights, infectious diseases, and physical access. The third section contains seven chapters covering topics related to teachers' rights and responsibilities: student injury, sexual harassment, academic freedom, performance evaluations, documentation and dismissal, and certification (licensure). The final section contains 10 chapters covering a variety of legal issues which principals commonly face: religious activities and instruction, copyright, affirmative action, school desegregation, and finance. The section also covers charter schools and alternative dispute resolution, and ends with a chapter on new directions in school law. The fifty-one authors of the chapters are either practicing attorney, professors of education, or university administrators who teach and write in the area of school law. (PKP)

ED 455 596

THE PRINCIPAL'S LEGAL HANDBOOK

SECOND EDITION

EDUCATION LAW ASSOCIATION

BEST COPY AVAILABLE

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☑ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL IN MICROFICHE AND IN ELECTRONIC MEDIA FOR ERIC COLLECTION SUBSCRIBERS ONLY HAS BEEN GRANTED BY

R. Wagner

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

2

2A

EA 031172

THE PRINCIPAL'S LEGAL HANDBOOK

SECOND EDITION

EDUCATION LAW ASSOCIATION

THE PRINCIPAL'S LEGAL HANDBOOK

Editors

William E. Camp
University of North Texas, Denton

Mary Jane Connelly
University of Tennessee, Knoxville

Kenneth E. Lane
California State University, San Bernardino

Julie F. Mead
University of Wisconsin, Madison

EDUCATION LAW ASSOCIATION
DAYTON, OHIO

DISCLAIMER

The Education Law Association (ELA) is a private, non-advocacy, and non-profit association of educators and attorneys. The opinions expressed in this publication are those of the authors and do not represent official views of the Association.

MISSION

ELA brings together educational and legal scholars and practitioners to inform and advance educational policy and practice through knowledge of the law. Together, our professional community anticipates trends in educational law and supports scholarly research through the highest value print and electronic publications, conferences, seminars, and professional forums.

Copyright © 2000
by
EDUCATION LAW ASSOCIATION
All Rights Reserved
Printed in U.S.A.
ISBN 1-56534-103-1

Published by
EDUCATION LAW ASSOCIATION
300 COLLEGE PARK
DAYTON, OH 45469
(937) 229-3589

TABLE OF CONTENTS

Students and the Law

Searches In Public Schools 3
Freedom of Expression 25
Student Discipline 37
Discipline Hearings and Due Process 49
Child Abuse 55
Student-To-Student Sexual Harassment 69
Student Records 87

Special Education and the Law

Federal Disability Law 101
Section 504 of the Rehabilitation Act 115
Disciplining Students With Disabilities 127
Transition: Individuals With Disabilities 145
Parents' Rights: Pitfalls of IEP Meetings 157
Infectious Diseases 185
Barrier-Free Facilities 201

Teachers and the Law

Student Injury 213
Sexual Harassment in the Workplace 227
Academic Freedom and Censorship 239
Evaluations 245
Documentation 257
Teacher Dismissal 267
Teacher Certification 279

Schools and the Law

Devotional Activities In Public Schools 293
Religion in the School Curriculum 313
Educational Curriculum 331
Copyright Issues in the Electronic Classroom 341
Charter Schools 351
Alternative Dispute Resolution Techniques 359
School Finance 367
Affirmative Action 373
Desegregation in the 1990s 385
New Directions in School Law 401

Students And The Law

1

Searches in Public Schools

Joseph Beckham

Introduction

Students do not shed their constitutionally protected rights when they enter a public school,[1] but state and federal judicial opinions make clear that the student has a limited expectation of privacy while in the school environment. Judges balance this limited privacy expectation against the school administrator's concern for maintaining discipline and insuring a safe learning environment. In doing so, they have consistently held that students may be subject to search when the decision to search is reasonable given all the circumstances present at the inception of the search, the search itself is limited in scope and the search is not unreasonably intrusive.

Legal Issues

In *New Jersey v. T.L.O.*,[2] the United States Supreme Court reviewed a case involving a search of a student's purse by a vice-principal. The administrator sought evidence to confirm a teacher's statement that the student had been smoking in a restroom. After questioning the student and hearing her denials, the vice-principal initiated a search of the student's purse. That search resulted in the discovery of a pack of cigarettes and rolling papers. Knowing that rolling papers were often used with marijuana, the administrator searched further, discovering a pipe, empty baggies, a large quantity of money in small bills, an index card with names and amounts of money owed, and a small bag of marijuana. The marijuana was turned over to police, and when the student was subject to a delinquency proceeding, she sought to have the marijuana excluded from evidence on the grounds that the marijuana was the product of an unconstitutional search.

The Supreme Court overruled a state court and held the search was justified at inception and reasonable in scope. The initial search was justified because the vice-principal had testimony from a reliable source that the student had violated school rules by smoking on school grounds and the purse was an obvious place for the student to keep cigarettes. Although the search was intended to confirm whether the student was in possession of cigarettes, the discovery of the rolling papers justified the continued search of the purse. The search was reasonable in its scope since the vice-principal's discovery of the rolling papers, which he associated with the use of marijuana, led him to continue to examine the contents of the purse for the illegal substance. In evaluating the student's claim to privacy, the majority opinion emphasized that the measures adopted in conducting the search were reasonably related to the objectives of the search and not excessively intrusive.[3]

The *T.L.O.* decision requires school administrators to make two sequential determinations when a search is contemplated. The administrator must first determine whether a search is justified by evaluating all the evidence leading up to a search. In evaluating the circumstances that might justify the search, the school administrator may take into consideration what is sought, the degree of individualized suspicion which may implicate a particular student and the age, history and background of that student. Once the totality of circumstances supports a "reasonable suspicion" for a search, the school administrator must balance the student's expectation of privacy against the legitimate need to maintain a safe learning environment in making a determination about how far the search should go. A search will be permissible in scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of that which is sought.

Individualized Suspicion

Searches of public school students must be justified at inception and reasonable in scope. In an illustrative case from California, a high school vice-principal received a telephone tip from the parent of a student. Although the parent identified herself, she asked for confidentiality out of fear for the safety of her child. The parent reported that her son had seen a specific student with a loaded handgun at a high school football game the previous evening. After receiving this tip, the vice-principal observed the suspected student put a backpack into a locker, searched the student's locker, and found a handgun in the backpack. When a criminal prosecution was initiated against the student, his attorney argued that the evidence obtained in the search was improperly obtained and should be suppressed.

Rejecting the motion to suppress this evidence, the state appeals court ruled that the circumstances justified the search of the locker. The court reasoned that the school official had information from a reliable source who had identified herself, and whose concern for confidentiality and the safety of her own child increased her credibility. The court emphasized that school officials should investigate reports that an identified student is carrying a firearm onto campus and found that checking the contents of a school locker was a minimally intrusive way of doing that.[4]

Judicial opinions in these cases clearly establish that the justification for a search is most compelling when the totality of circumstances provides individual suspicion implicating a particular student. For example, the testimony of a high school teacher who reported overhearing two students discussing their drug activities on campus justified a locker search in an Illinois high school. A school resource officer was directed to search the student's lockers, and pursuant to that search, several bags of marijuana were discovered. When the students were confronted, they identified two other students who they claimed had marijuana. A search of the lockers of these two students resulted in the discovery of more marijuana. In holding that the searches met the reasonable suspicion standard, a state appeals court ruled that school officials were justified in conducting the searches because they had individualized suspicion based on the testimony of a teacher and information from students.[5]

Individualized suspicion, again based on the testimony of informants, was also present in a case in which two students at a Massachusetts high school reported to a teacher that a senior had just shown them a handgun. The teacher reported the information to the assistant principal, and, although he did not tell the administrator the names of the students who had provided the information, he did convey to the assistant principal his confidence in the reliability of these students. School officials brought the suspected student to the office for questioning, searched his locker and located a gun in the pocket of a jacket found in the locker. Ruling that the warrantless search of the student's locker was justified at its inception and reasonable in scope, the state supreme court held that the search was not a violation of privacy rights under the Fourth Amendment. The court concluded that the assistant principal had a reasonable suspicion of wrongdoing based on the statements of students who had direct personal knowledge of the facts which established the basis for the search.[6]

In an Indiana case, a rash of school locker thefts and the discovery that the master locker combination book was missing led to an investigation in which a student informant specifically identified a student who was said to have the combination book in a blue bookbag. The student who was suspected of having the combination book was removed from class and escorted to his locker where he retrieved a blue bookbag. Once in the school office, the student's bag was searched and the missing book was discovered. The student's attorney moved to suppress this evidence in a later delinquency proceeding involving charges of theft, but the state appeals court rejected this motion. Finding that the search of the bookbag was reasonable under the circumstances, the state appeals court reasoned that the search was justified at inception because school officials established individualized suspicion. The individualized suspicion was properly based on the testimony of an informant who provided specific identification of the student and detailed information concerning where the book could be found. The search was reasonable in scope because school officials confined the search to the blue bookbag, and they had sufficient information to believe that they would find the missing combination book in that bag.[7]

In addition to the testimony of an informer, individualized suspicion can be supported by additional information about the history and background of the student. A New Hampshire assistant principal received an anonymous phone call in which the caller said that a particular student at the high school would be carrying drugs to school that day. The caller identified the student by name, and the assistant principal knew of the student as a result of reports from teachers that implicated the student in a drug transaction at school. The administrator was also aware that the student had been arrested for drug possession in another state. The student, who reported late for school, was called into the principal's office and told to turn his pockets inside out. The contents of his pockets included a pipe and rolling papers. The principal then required the student to open his knapsack, which held several bags of marijuana and an unloaded semi-automatic pistol. The Supreme Court of New Hampshire held that the totality of circumstances justified the search. The telephone tip, which specifically identified the student, together with the existing knowledge of the student's drug involvement, was enough to establish individual suspicion for the initial search. The discovery of the pipe and rolling papers provided further evidence of probable drug possession that justified the search of the knapsack.[8]

A student's erratic behavior may contribute to the totality of circumstances justifying reasonable suspicion for a search. When an Alaskan high school student was confronted for creating a disturbance in the school library, a school security officer noticed that the student swayed and bumped into objects as he walked, and the student's eyes were glassy and face flushed. The student would not explain where he had been at lunch, and his automobile was improperly parked on school grounds. The assistant principal undertook a search of the student's automobile, and two grams of cocaine were discovered. When the student's attorney sought to have this evidence suppressed, the state appeals court ruled that the search was reasonable. Individualized suspicion was established because, in addition to the student's violation of school conduct rules, there was evidence of disorientation based on the observations of school officials and the improperly parked automobile added to suspicion that the student was using drugs.[9]

Individualized suspicion need not always implicate a single student. For example, administrators in a Hawaii high school observed a student and her companion leave school grounds without authorization and cross the street to an area called "the Tunnel," a culvert system off school grounds where students were known to gather to smoke tobacco and marijuana. A vice-principal and school security officer followed the students into the area, detected the odor of burning marijuana, and observed four students congregating near a grate. All four students exited when directed to do so, but only two students were carrying purses. The two students who were carrying purses were subjected to a search, and the marijuana was found when the students emptied the contents of their purses on the principal's desk. The state supreme court ruled that there was a reasonable suspicion for the search of the students, given the totality of the circumstances. The court reasoned the students were violating school policies by being in a restricted area, school officials detected the odor of marijuana, and there were only four students in the area. Credible evidence supported the search of the purses, since this would be a likely storage place for the marijuana.[10]

It is important to note, however, that reasonable suspicion typically requires more than evidence that a student violated a school conduct code. In most circumstances, school administrators must explain why the search is reasonably related to the offense the student has committed and show that the totality of circumstances justifies both the basis for search and the scope of the search. For example, a student in a Texas high school was brought to the office to investigate why he was skipping school. The student first denied he drove a car to school, but when car keys were discovered in a pat-down search, the student admitted that he had lied. Based solely on this information, a search of the student's automobile was undertaken and drugs were found in the trunk of the car. A state appeals court ruled that it was reasonable for the principal to detain and investigate why the student was skipping school, and a pat-down in those circumstances was justified for safety reasons. However, the search of the student's car was not justified on the basis of the infraction, and the evidence obtained in that search could not be used in the criminal prosecution of the student.[11]

The totality of circumstances should include consideration of all the evidence implicating a student as well as the context of the search, the age and history of the student, and the nature of that which is sought. In a case from Illinois, a school resource officer in an alternative school for students with discipline problems received reports from teachers that a student intended to sell drugs to students and planned to bring drugs to school that day. The student who was suspected of drug possession was standing at a locker with a student who was in possession of a flashlight. Both students were talking and giggling and this aroused the officer's suspicions because the two students seemed to think they were putting something over on him. Considering it unusual for a student to have a flashlight at school, and knowing that both students were suspected of dealing drugs at school, the officer seized and searched the flashlight in the possession of the second student and discovered a quantity of crack cocaine in the case. The student sought to avoid prosecution by contending that the search was unconstitutional.

The state appeals court ruled that the reasonable suspicion standard applied to the officer when performing duties in the school setting.[12] Finding that the totality of circumstances would lead a reasonable person to suspect that the student was carrying drugs in the flashlight, the seizure and search of the flashlight was reasonable. The court emphasized that this was an alternative school for students with behavioral problems, and this context, coupled with the suspicious conduct of the students and their history of suspected drug activity, heightened the urgency of maintaining a safe and secure learning environment.[13]

Pat-Down Searches

The closer the search to the person, the more the school official must rely on the totality of circumstances to establish a reasonable basis for a search. There is little expectation of privacy in a locker, particularly when school policy makes it clear that lockers are the property of the school and subject to inspection at any time.[14] A student's bookbag or purse carries some expectation of privacy, requiring more evidence of individualized suspicion, but touching the outside of the bookbag or purse would not be as intrusive as examining the contents.[15] The touching of the student in a pat-down or pocket search would compel a heightened standard of individualized suspicion with a stronger evidentiary basis for the search.

For example, in a case from Indiana, a school security officer's decision to search a student who was late in arriving at a school-sponsored after-hours academic program was regarded as an "improvisational" search not justified by the evidence of misconduct. The search was undertaken because the school had a policy of searching program participants with a hand-held wand in order to check for weapons. At the time the student arrived at school, the metal detector had been locked in the principal's office, and the officer elected to conduct a search of the student that included placing his hands in her pants' pockets. Two partially smoked marijuana cigarettes, a wooden pipe and a package of rolling papers were discovered in the student's pockets. The reviewing state court found that the search did not meet the reasonableness standard and was not justified by the student's tardiness.[16]

Despite the outcome in the case above, judges often adopt an exception to the rule requiring more evidence for a more intrusive search when pat-downs are undertaken. Judges recognize that school administrators and school resource officers may be at serious risk if a student is carrying a weapon. In a representative case involving the use of a frisk for a weapon, a school security officer in a New York high school observed a youth entering the school in an area that was "off limits," and failing to recognize the individual as a student, demanded identification. When the youth failed to produce identification, the guard sought to escort the youth to the school office. As he took the youth's elbow, the guard's hand brushed against a metal object that was thought to be a handgun in the student's waistband. An immediate pat-down resulted in the recovery of a pistol. The officer was justified in frisking the student based on an apprehension that the student was carrying a weapon.[17]

Strip Searches

Strip searches constitute the most intrusive form of search and create the greatest risk of legal liability for school officials. Many school districts prohibit the use of strip searches under any circumstances, and school officials should be extremely cautious in undertaking such searches, as a case from Indiana illustrates. In this case, six seventh grade girls in an Indiana school district sued the district and school employees for violating their rights under the Fourth Amendment in the conduct of a strip search. The search was initiated when it was reported that four dollars and fifty cents were missing from the girl's locker room at the end of a physical education class. The school principal directed that a search of the lockers and the students be undertaken. The search began with an inspection of lockers and bookbags, and then each of the girls was brought into the locker room to determine whether the missing money might be hidden in a bra. All of the "strip" searches were conducted in a similar fashion, although the searches varied in that in some instances the girls removed blouse and bra for inspection and in other instances the bra was inspected by lifting it up. There was visual inspection in some cases and digital contact in others. Once the search was completed the girls were permitted to go on to their next class.

The federal district court ruled that strip-searching the seventh-grade girls was not reasonable under all the circumstances of the case, but limited liability to the principal and teachers who conducted the search and did not extend liability to the school district. The claim against the school board and the superintendent was dismissed because there was no basis for concluding that the school district had in place a custom or practice of permitting unconstitutional searches. However, the court rejected the claim of the principal and teachers that their acts were protected under the doctrine of qualified immunity. Under this doctrine, school officials would be immune from liability if their conduct did not violate clearly established rights of which a reasonable official would have been aware at the time of the conduct. In the court's view, the conduct of a strip search in an effort to recover the "grand sum" of four dollars and fifty cents from young students was clearly a violation of the Fourth Amendment right to privacy.[18]

In a case with similar factual circumstances, two Alabama public school employees who strip-searched two eight year-old elementary school girls were granted qualified immunity from suit. A student accused the two girls of stealing seven dollars from another student's purse and hiding the money in a backpack. When the two girls were questioned, each denied involvement and accused the other of the theft. After checking one student's backpack, a teacher and counselor took the two girls to a girl's restroom and directed them to go into individual stalls and come back out with their underpants down to their ankles. The students complied, but no money was found. After further questioning, the two girls were directed to enter the bathroom stalls and remove their dresses. The students reemerged, one in a slip and the other in underwear and shook out their dresses, but the missing money was not located. When these events were brought to the attention of the school board, the board condemned the conduct of the employees as a gross error in judgment, but did not undertake sanctions. When the parents of the two girls sued in federal district court, the court granted summary judgment to the school district finding no liability for an illegal search and seizure. The district court also granted the school employees qualified immunity, concluding that Fourth Amendment law was not clearly established as it applied to the conduct of the strip search.

The Eleventh Circuit ultimately affirmed the district court decision, finding that the law of search and seizure did not give sufficiently clear notice to the defendants that their conduct violated the Fourth Amendment. While the court noted that school officials used less than the best judgment in conducting a highly intrusive strip search, the court never-the-less concluded that it was not in the position to second guess the motives of the school employees.[19]

Despite the highly intrusive nature of a strip search, and the potential risk of civil liability for the school administrator, several recent decisions have upheld such searches in circumstances in which a strong evidentiary basis supported individualized suspicion and the items sought were either drugs or weapons. In a case involving an Illinois high school student enrolled in a behavioral disorder program, school administrators acted on observations by teachers and administrators of an unusual bulge in the crotch area of the student's sweatpants. The student had been rumored to have smoked marijuana on the school bus and was known to have failed to complete an off campus drug rehabilitation program. Teachers and students had previously reported that the student had been in possession of drugs at school. Believing that the student was hiding drugs in the crotch of his underwear, two male administrators accompanied the student to a locker room, locked the door after determining that no other persons were in the area, and observed the student after directing him to remove his street clothes and put on a gym uniform. In the course of the observation, no drugs were discovered.

While acknowledging that subjecting a student to a nude search is an intrusion on the individual's expectation of privacy, the federal appeals court found that the administrators based their decision to conduct the search on a number of factors that justified the intrusive procedures. Given the reports by various teachers and aides, the student's history and the administrator's observations, the cumulative evidence was sufficient to create a reasonable suspicion that the student was concealing drugs. The search was regarded as reasonable in scope because the search was conducted in the privacy of the locker area by persons of the same sex as the student, the student was allowed to change into gym clothes while his street clothing was physically examined, and the administrators stood a discrete distance from the student to undertake a visual inspection.[20]

A less intrusive search was conducted by a high school administrator who was overseeing a student participating in an after-school smoking cessation program. The student had been caught smoking at school on two previous occasions and was required to attend the after-school program. During the program, he was noisy and distracted. The administrator noticed that the student's eyes were bloodshot and dilated, and she asserted that his handwriting appeared erratic. The administrator suspected the student was using drugs and confronted him with this accusation. The student denied that he was using drugs, and the administrator took the student to the office of the school nurse for her evaluation of the student. The nurse noted that the student's blood pressure and pulse were high and confirmed that the student's eyes appeared dilated. Although the nurse would not conclude that the student had been using drugs, the administrator took the student to a private room and required him to remove his shirt, hat, shoes, and socks. At all times, the student continued to wear his undershirt and pants. No drugs were discovered during the search.

In response to a civil suit against the administrator and the school district, a federal appeals court ruled that the use of the medical assessment did not violate the student's right to privacy, nor did the intrusive search of the student deny the protections of the Fourth Amendment. The court regarded the student's behavior and condition to be an appropriate basis on which to ground a suspicion of drug use, and held that the search was both justified at its inception and reasonably related to its objective. While recognizing that the more intrusive the search the greater the standard of reasonable suspicion required, the court did not regard this search as unreasonably intrusive since the search was less intrusive than requiring the student to strip all clothing.[21]

Several informants told the school principal that a Wisconsin fourteen-year-old was carrying a knife on school grounds. The principal called the school police officer, and the officer interviewed one of the informants. After identifying the student, the officer went with the Dean of Students to take the student out of class. The officer explained to her that they had received information that she may have a knife or gun. He did a quick pat-down search of her jacket and had the student empty and display the contents of her backpack. Her locker was also searched. She was then taken to the police officer's office and was told that she was going to be searched again. During this search, the officer lifted up the bottom of her blouse so he could inspect her waistband. When he did, he saw the handle of a knife near her hip. He removed a nine-inch knife that was locked in the open position. In a Wisconsin juvenile proceeding, the student was charged with carrying a concealed weapon on the high school campus. Her motion to suppress the weapon was granted by the lower court and the state appealed.

The student argued the search was highly intrusive and because it was conducted by a police officer, probable cause was required for a permissible search. The court distinguished between a search initiated and conducted by police acting independently from school officials and those conducted in conjunction with school officials. Here there was a law enforcement officer assigned to the school whose responsibilities included helping school officials curb unsafe situations. The appeals court concluded that due to their limited training in dealing with potentially dangerous situations, school officials should be allowed to call on trained law enforcement officers to help them without forfeiting the protection of the reasonableness standard in searches. The court found that the search of the student met the standard of reasonable suspicion.[22]

In the limited cases in which strip searches have been addressed, courts have required a high degree of individualized suspicion, often involving the corroboration of more than one reliable informant and other credible evidence tending to confirm drugs or weapons possession. The search itself typically involves two witnesses of the same sex as the student who observed the student undress to his or her underwear rather than a completely nude search.[23] Whenever possible, the protocol for the strip search should enable school officials to avoid any necessity for touching and should require the student to remove only outer garments for a visual inspection.[24] In what constitutes a unique instance of a search involving the visual examination of a child's body, two federal appeals courts have ruled that school officials are entitled to qualified immunity when investigating whether a child has been abused, particularly when the investigation is initiated after the student has complained of pain in an area and is evasive about the circumstances that led to a suspected abuse injury.[25]

General or Random Searches

A general or random search is one in which school officials lack individualized suspicion for a search and undertake searches of several students. When highly intrusive, these searches are difficult to justify.[26] However, a decision of the United States Supreme Court suggests that general or random searches may be permissible under certain circumstances. In *Vernonia School District v. Acton*,[27] an Oregon high school's policies requiring random drug testing of students participating in extracurricular athletic programs were justified by evidence of widespread and pervasive drug use on the part of student-athletes. The school district began its program of random urinalysis testing for students participating in athletics programs after drug use was discovered to be a major problem at the school, disciplinary problems had increased, and evidence had emerged that student athletes were among the leaders of a drug culture. Initially, the school district responded to the problem by providing special classes, speakers, and presentations designed to deter drug use. When serious problems persisted, parents and school officials developed a drug testing program for all students participating in interscholastic athletic competition. Consent for testing was required for participation, all student athletes were tested prior to the beginning of the sports season, and weekly random testing was undertaken during the season. Students selected in the random draw were given a specimen vial and accompanied by a monitor to an empty locker room where, remaining fully clothed with back to the monitor, the student produced a specimen at a urinal. Girls produced a sample in a closed stall, where they could be heard but not observed. Results were analyzed at an independent lab and communicated to authorized school officials only.

When a student and parent challenged the legality of the policy, the United States Supreme Court issued an opinion concluding that the school district's interest in deterring drug use and the desirability of reducing the risk of injury associated with drug use among student athletes justified the policy. Although the drug testing of student-athletes was a search under the Fourth Amendment, the Court reasoned that the students in this case were committed to the custody of the school, giving the school a degree of supervision and control greater than it could exercise over adults. In particular, student-athletes had an even lesser expectation of privacy because there was an element of communal undress in their participation on school teams, and they must submit to physical examination as part of their participation. Furthermore, the results of tests remained confidential and were not released to law enforcement officials nor used for disciplinary purposes. In balancing the intrusiveness of the search against the school district's legitimate interests in discouraging drug use, the majority opinion reasoned that the process of obtaining urine samples was not highly intrusive, and any compromise of the students' privacy interest was considered justified.[28]

While the *Acton* decision applies to drug testing of student-athletes, other courts have recognized that general searches, conducted without individual suspicion, do not violate the Fourth Amendment where the government need is great, the intrusion on the individual is limited, and a more rigorous standard of suspicion in unworkable. The "special need" to protect students from harm and insure their health and safety offers a persuasive basis for permitting suspicionless searches.[29] The Seventh Circuit has affirmed a district policy in which all students participating in extracurricular programs or authorized to drive to school had to submit to random and suspicionless urine testing for alcohol, cigarette, and unlawful drug use.[30] The court noted that the policy was designed to deter drug use and not to catch or punish users and applied only to students who wished to voluntarily participate in an activity. Quoting from *Schaill v. Tippecanoe County School Corporation*,[31] the court emphasized that "if the schools are to survive and prosper, school administrators must have reasonable means at their disposal to deter conduct which substantially disrupts the school environment."[32]

However, courts remain divided as to whether drug testing can be extended to student groups other than student athletes. While the Seventh Circuit has reaffirmed that random drug testing of students participating in extracurricular activities is constitutional under the *Acton* standards,[33] the court held unconstitutional an Indiana school district's non-random policy requiring drug and alcohol testing of any student who possesses or uses tobacco, is truant, or is suspended for three or more days.[34] The Eighth Circuit has upheld random urinalysis testing of all eighth through twelfth grade students in an Arkansas school district with the proviso that failure to consent to testing would prohibit the student from participating in extracurricular activities sponsored by the school district.[35] However, the Colorado Supreme Court has held that *Acton* did not reach the drug testing of school band members because participation in the band may not be wholly voluntary and the level of communal undress exhibited by band members was not comparable to that of athletes in *Acton*.[36]

In each of the above cases, the state and federal courts weighed three factors in coming to a conclusion about the drug searches proposed in the school policies. Judges considered the privacy interests of the students, noting that students in public schools have a lesser expectation of privacy than do members of the general public and emphasizing that schools have a custodial responsibility for the safety and welfare of children. Judges also weighed the nature and character of the proposed intrusion, considering to what extent was invasive and whether results of the "search" were subject to broad disclosure. Finally, the judges assessed the governmental interest involved, giving particular credence to efforts designed at deterring drug testing of athletes. Testing is clearly permissible when there is evidence that a drug problem exists and school officials have taken less restrictive initiatives to address the problem without success.[37] Whether more extensive drug testing of students, going beyond testing of students who voluntarily participate in school sponsored athletic programs, will be permitted by courts remains uncertain.

The use of metal detectors and sniff dogs to detect weapons or drugs may be permissible as part of a general search policy.[38] School districts that can document the severity of problems involving drugs and weapons possession in their public schools and who develop search policies that are minimally intrusive in light of the legitimate governmental interest in deterring these problems have a persuasive basis for the use of general search policies. For example, when a Texas school district adopted a policy of random searches using sniff dogs trained to look for drugs, alcohol, firearms and other contraband in student automobiles parked on school property, a federal appeals court sustained the policy. The court emphasized that if it could be demonstrated that the dog had been proven reliable in detecting drugs, then the search of an automobile is justified once the dog alerts.[39]

The use of drug-detection dogs for random, suspicionless searches of school lockers and automobiles on school grounds is typically regarded as minimally intrusive and unlikely to violate student privacy rights.[40] However, one federal appeals court has signaled that the use of dogs to sniff students would violate Fourth Amendment standards if no reasonable suspicion implicates the particular student.[41] Under the circumstances of this case, the school's use of sniff dogs to discover drugs in student lockers or in empty classrooms where students kept bookbags was permissible, but the use of the dogs to sniff individual students violated constitutional privacy protections. However, the court granted qualified immunity to school officials and local police, ruling that there could be no individual liability for a violation of Fourth Amendment rights when the law involving the use of sniff dogs to conduct random, suspicionless searches of a student's person was not clearly established at the time the searches occurred.

A New York high school with an on-going problem of violence and weapons possession among students set up metal detector scanning posts in the main lobby of the building. Students were told to remove all metal objects before passing through the posts, and, when crowding became a problem, a random procedure was used to select students who would pass through the metal detector. If a student activated the device he or she was told to remove all metal objects and cross through the posts a second time. If the student activated the detector a second time, a pat-down search was conducted. Using this procedure, a female student was discovered with a switchblade knife. When the student sought to suppress the weapon in a later criminal prosecution, the court ruled that the search was permissible and emphasized that the use of a metal detector was a minimally intrusive search, and the more intrusive pat-down was only undertaken after the scanning device was twice activated.[42]

A Pennsylvania urban high school enforced its policy forbidding drugs or weapons on school property by employing police officers to conduct metal detector scans and bag searches of students. Signs were posted warning of the search policy, and parents were notified of the policy periodically during the year. The procedure for conducting the searches involved bringing students into the gym where they formed lines and stepped up to a table. At the table, each student emptied his or her pockets, surrendered his or her jacket or any bags in his or her possession, and was scanned by an officer using a metal detector. When a student surrendered a Swiss army knife while emptying his pockets, he was arrested for possession of a weapon on school property. A state appeals court noted that in light of the school's efforts to make student and parents aware of the search procedures, the student's expectation of privacy was greatly reduced. The court held the search was justified given the high rate of violence in the district's public schools.[43]

Florida high school students were subject to random, hand-held metal detector scans conducted in classrooms. Under the protocol, a classroom would be randomly selected, and students would be segregated by gender and directed to remove all metal objects from their clothing. If a detector sounded, the student would be asked to remove the metal object before a second scan. If the detector sounded a second time, the area would be patted down. During the search process, a student was observed taking off his jacket and moving it to the back of the room while the scanning procedure was taking place. The jacket was patted down and a handgun was discovered. A state appeals court found that the search policy minimized the intrusion into students' privacy while meeting a school district's immediate concern to deter the presence of weapons in schools and promote a safe learning environment.[44]

Searches Off School Grounds

When school officials can point to a past history of problems involving drugs or weapons, or to situations in which students will be supervised off school grounds during field trips or class trips, extraordinary measures involving general, suspicionless searches may be justified. Under one junior high school's policy, students who participated in a voluntary field trip and picnic were subject to a search of hand luggage before boarding the trip bus. School officials required parental approval using a permission slip that included a statement that hand luggage would be searched. A New Jersey appeals court concluded that the interest of school officials in insuring that students did not bring prohibited "contraband" on a field trip justified the policy. Although there was no evidence of individualized suspicion for the search, the court rationalized the general search policy by pointing to its deterrent potential in discouraging students from bringing prohibited items. The court also noted the special duty of supervision that was created in the context of a field trip in which supervising teachers would not have the level of control over students available in the school setting.[45]

In an unusual case involving a breathalyzer test administered to students participating in the first day of a senior trip, an Oregon high school student sued the local district when he was suspended after the test indicated he had been drinking alcohol. The student was participating in a senior trip that departed school grounds at 5:00 a.m. While on the bus, one student began throwing up and another appeared to pass out. A student informed the principal that a party had been held the night before and heavy drinking had occurred. This same student identified students who had attended and been seen drinking at the party. The principal ordered the buses to return to the school, where local police met them. The police proposed that students be taken to the station for breathalyzer tests, and the school officials agreed. The student in this case had admitted to an assistant principal that he had been drinking. When tested, he was found to have a blood-alcohol level of .033. Police issued a citation and the student was suspended for three days. The suspension would have prevented the student from participating in graduation exercises and an awards ceremony, but the school board allowed the student to participate in the graduation exercise. In this case, the use of police officers in the conduct of the search effectively elevated the applicable standard from that of reasonable suspicion to that of probable cause. In examining the validity of the search under the Fourth Amendment, the court held that school officials and law enforcement officers had probable cause to detain and undertake the test based on the totality of circumstances within their knowledge. The key elements of that knowledge included observation that the individual student smelled like alcohol, the vice-principal's statement that the student admitted he had been drinking alcohol, and a reliable student informant's testimony that he observed the student drinking at the party the evening before.[46]

Recommendations for Practice

- In cases involving student searches, the challenge for the courts is always how to strike the appropriate balance between the school district's legitimate interest in maintaining a safe and appropriate learning environment and the student's reasonable expectation of privacy protected by the Fourth Amendment. The legality of a search will depend on a standard of reasonableness given all the circumstances relating to the search.
- While students have an expectation of privacy in the school setting, the state's custodial and supervisory authority over the student means that the student has a lesser expectation of privacy than would an ordinary citizen.
- Courts apply a standard of "reasonable suspicion" to the actions of school officials in the conduct of most searches, requiring that the official present evidence that the search was justified at inception and reasonable in scope. Searches are more likely to be permissible when there is evidence implicating a particular student.
- In evaluating the totality of circumstances justifying a search, school officials should consider the weight and credibility of evidence implicating an individual student, the age and previous history of the student, and the nature of that which is sought.
- In deciding how intrusive a search to undertake, school officials must recognize that the more intrusive the search, the greater the degree of individualized suspicion there must be. In most jurisdictions, locker searches are the least intrusive forms of search and a formal school policy authorizing such searches will reduce the likelihood that a student could effectively claim an expectation of privacy in his or her locker.
- Highly intrusive searches, such as strip searches, require a high degree of individualized suspicion, based on specific and reliable evidence, and should only be undertaken when serious infractions, such as possession of drugs or weapons, are suspected.

- General, suspicionless searches require that school officials document the nature and immediacy of the school district's "special need" to provide security and safety. Policies on these searches must also ensure the efficacy of the search procedure. Typically, searches of this type require documentation of serious drug or violence problems in the school setting coupled with a policy in which school officials follow uniform procedures that avoid a highly intrusive search. Students should be given notice of the search policies and the procedures should be followed carefully to ensure that the initial search involves a minimal intrusion on the student's privacy. Policies permitting such searches should emphasize the deterrent potential of the search as a means of discouraging drug and weapons possession.

References

[1] Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969).

[2] New Jersey v. T.L.O., 469 U.S. 325 (1985).

[3] *Id.* at 340.

[4] *In re* Joseph G., 38 Cal.Rptr.2d 902 (Cal. App. 1995).

[5] People v. Taylor, 25 N.E.2d 785 (Ill. App. Ct. 1993).

[6] Commonwealth v. Carey, 554 N.E.2d 1199 (Mass. 1990). *See In re* Patrick Y., 746 A.2d 405 (Md. App. 2000) (judge suggested that reasonable suspicion is not required for search of a school-owned locker).

[7] S.A. v. State, 654 N.E.2d 791 (Ind. Ct. App. 1995). *See also*, C.B. v. Driscoll, 82 F.3d 383 (11th Cir. 1996) (reliance on a student informant resulted in the discovery of a look-alike drug which was located in a student's coat pocket).

[8] State v. Drake, 662 A.2d 265 (N.H. 1995).

[9] Shamberg v. State, 762 P.2d 488 (Alaska Ct. App. 1988). *See* A.S. v. State, 693 So. 2d 1075 (Fla. Dist. Ct. App. 1997) (assistant principal lacked reasonable suspicion for search of a student's wallet when she discovered the student in a hallway with other students "fiddling" in his pocket with one hand and holding money in the other hand).

[10] In Interest of Doe, 887 P.2d 645 (Haw. 1994). *See also*, Smith v. McGlothlin, 119 F.3d 786 (9th Cir. 1997) (a search of twenty students observed smoking adjacent to school grounds led to the discovery of a student carrying knives to school. The federal appeals court ruled the search reasonable under the cir-

cumstances and affirmed a grant of qualified immunity to the principal who initiated the search).

[11] Coronado v. State, 835 S.W.2d 636 (Tex. Ct. App. 1992). *See* Covington City, v. G.W., 767 So. 2d 187 (Miss. 2000) (the testimony of student informants and empty beer cans in the back of a student's pick-up truck justified an administrator's search of the vehicle to corroborate testimony that the student was drinking on school grounds).

[12] People v. Dilworth, 661 N.E.2d 310, 314 (Ill. 1996). *See* S.A. v. State, 654 N.E.2d 791 (Ind. Ct. App. 1995) (a search of a student's bookbag by a school liaison officer met the reasonable suspicion standard, and, when acting in his capacity as security officer for the school district, the officer's conduct was governed by the standard of reasonable suspicion), and James v. Unified Sch. Dist., 959 F. Supp. 1407 (D. Kan. 1997) (a police officer was granted qualified immunity for the conduct of a search of a vehicle on school grounds on the basis that it was not established that an officer must meet a probable cause standard when accompanying school officials in a search on school grounds). *See also*, State v. D.S., 685 So. 2d 41 (Fla. Dist. Ct. App. 1996) (the presence of a school resource officer in the conduct of a search on school grounds does not heighten the standard of reasonable suspicion for a search). *But see*, State v. Tywayne H., 933 P.2d 251 (N.M. Ct. App. 1997) (police acting as security for a school dance were held to a standard of probable cause for a search of a student).

[13] *Id.*

[14] *See* Commonwealth v. Cass, 709 A.2d 350 (Pa. 1998).

[15] Matter of Gregory M., 585 N.Y.S.2d 193 (App. Div. 1992). In this case, a school security officer patted down the exterior of a student's bookbag when the metallic thud of the bookbag on the desk alerted the officer to the possibility of a weapon. The outline of a gun led the officer and a school administrator to search the bag and they discovered a handgun. In a subsequent juvenile court proceeding, the court ruled that the search was reasonable and the weapon was properly admitted in evidence.

[16] D.I.R. v. State, 683 N.E.2d 251 (Ind. Ct. App. 1997).

[17] Matter of Kevin P., 587 N.Y.S.2d 730 (App. Div. 1992). *See also*, J.A.R. v. State, 689 So. 2d 1242 (Fla. Dist. Ct. App. 1997) (school resource officer's pat down of a student was justified by reasonable suspicion based on informant's tip that student had a handgun.

[18] Oliver by Hines v. McClung, 919 F. Supp. 1206 (N.D. Ind. 1995). *See also*, State *ex rel.* Galford v. Mark Anthony B., 433 S.E.2d 41 (W. Va. 1993) (a strip search of a student to locate money missing from a teacher's purse was unreasonable in scope and excessively intrusive).

[19] Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997)(en banc). A similar result, holding that school officials were immune from liability for a strip search, was reached in Smith v. McGothlin, 119 F.3d 986 (9th Cir. 1997). *But see* Thomas v. Clayton Cty. Bd. of Educ., 94 F. Supp.2d 1290 (N.D. Ga. 1999) (a strip search of twenty-two fifth graders to find $26 missing from the teacher's desk exceeded constitutional boundaries) and Konop v. Northwestern Sch. Dist., 26 F. Supp.2d 1180 (D.S.D. 1998) (strip search of eighth grade girls for allegedly stolen $200 was excessively intrusive under the Fourteenth Amendment).

[20] Cornfield v. Consolidated High Sch. Dist. No. 130, 991 F.2d 1316 (7th Cir. 1993).

[21] Bridgman v. New Trier High Sch. Dist. No.203, 128 F.3d 1146 (7th Cir. 1997).

[22] In Interest of Angelia D.B., 564 N.W.2d 682 (Wis. 1997).

[23] *See* Widener v. Frye, 809 F. Supp. 35 (S.D. Ohio 1992).

[24] *See* Williams By Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991).

[25] Tenenbaum v. Williams, 193 F.3d 581 (2d Cir. 1999) and Dept. of Children and Youth Serv., 892 F.2d 670 (7th Cir. 1990).

[26] *See* Kennedy v. Dexter Consolidated Sch., 955 P.2d 693 (N.M. Ct. App. 1998); Burnham v. West, 681 F. Supp. 1160 (E.D. Va. 1987); and Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977). *But see*, Brousseau v. Town of Westerly, 11 F. Supp.2d 177 (D.R.I. 1998) (holding that pat-down of students to locate a large knife missing from the school cafeteria was justified by concern for student safety and well-being), and Matter of Haseen, 674 N.Y.S.2d 700 (Sup. Ct. 1998) (ruling that a quick pat-down of students' outer clothing to discover concealed eggs planned for Halloween pranks was permissible, and discovery of gun butt protruding from student's waistband justified further search by school authorities).

[27] Veronica Sch. Dist. v. Acton, 515 U.S. 646 (1995).

[28] *Id.*

[29] *See* Chandler v. Miller, 117 S. Ct. 1295, 1301 (1997).

[30] Todd v. Rush County Sch., 133 F.3d 984 (7th Cir. 1998).

[31] Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1324 (7th Cir. 1988).

[32] *Todd*, 133 F.3d 984 at 986 (7th Cir.1988).

[33] Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052 (7th Cir. 2000).

[34] Willis v. Anderson Community Sch. Corp., 158 F.3d (7th Cir. 1998), *cert. denied*, 526 U.S. 1019 (1999).

[35] Miller v. Wilkes, 172 F.3d 574 (8th Cir. 1999).

[36] Trinidad Sch. Dist. v. Lopez, 963 P.2d 1095 (Colo. 1998).

[37] Colwell, W. B., *Beyond Veronica: When Has a School District Drug Testing Policy Gone Too Far?* 131 EDUC. L. REP. 547 (March 4, 1999).

[38] *See*, e.g., *In re* Latasha W., 70 Cal.Rptr.2d 886 (Cal. App. 1998) (metal detector used to discover knife); State v. J.A., 679 So. 2d 316 (Fla. Dist. Ct. App. 1996) (metal detector followed by pat-down and discovery of a handgun); *In re* S.S. 680 A.2d 1172 (Pa. Super. Ct. 1996) (boxcutter knife discovered during scan of students and pat-down of coat); and People v. Pruitt, 662 N.E.2d 549 (Ill. App. Ct. 1996) (walk-through detector resulted in pat-down and discovery of handgun).

[39] Jennings v. Joshua Indep. Sch. Dist., 877 F.2d 313 (5th Cir. 1989). *See also* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982).

[40] *See* Commonwealth v. Cass, 709 A.2d 350 (Pa. 1998).

[41] B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260 (9th Cir. 1999).

[42] People v. Duke, 583 N.Y.S.2d 850 (Crim. Ct. 1992).

[43] *In re* Interest of F.B., 658 A.2d 1382 (Pa. Super. Ct. 1995). *See* In Interest of S.S., 680 A.2d 1172 (Pa. Super. Ct. 1996) (a blanket search that included a pat-down of a student's coat was reasonable though not based on individualized suspicion. On entering the school, students placed their coats on a table and were subject to a metal detector scan. In patting down the student's coat, a box cutter was discovered and the student was subject to a juvenile court prosecution. The state court found that the search was reasonable given the uniformity of the search process and documentation of a high rate of violence in area schools). *See also* People v. Pruit, 662 N.E.2d 540 (Ill. App. Ct. 1996) (a student passing through the metal detector set off the alarm and was subject to a pat-down by a police officer who discovered a handgun. When the student sought to suppress this evidence in a criminal trial, a state appeals court held that the screening was minimally intrusive since no touching occurred unless the detector alerted, and, once the detector reacted, the facts were sufficient to justify a pat-down search).

[44] State v. J.A. 679 So. 2d 316 (Fla. Dist. Ct. App. 1996).

[45] Desilets v. Clearview Bd. of Educ., 627 A.2d 667 (N.J.Super.Ct. App. Div. 1993).

[46] Juran v. Independence Central Sch. Dist., 898 F. Supp. 728 (D. Or. 1995).

2

Freedom of Expression

David Schimmel

Introduction

For more than 175 years, it was assumed the United States Constitution did not protect student freedom of speech or press. If students challenged school censorship during those years, courts presumed that the school's policy or disciplinary action was valid, and students had the burden of proving that the censorship was unreasonable. The task was nearly impossible, and the rare student who went to court almost always lost. In effect, the First Amendment applied to adults in the community but not to students in the schools.

In the 1969 landmark case of *Tinker v. Des Moines*,[1] the United States Supreme Court held that the First Amendment did protect freedom of expression in the public schools. Most administrators have come to accept the *Tinker* ruling and have shaped their school policies accordingly. However, in a 1986 case about a controversial student speech[2] and a 1988 case concerning student newspapers,[3] the Supreme Court ruled in favor of administrative limitations on student expression. In view of these apparently conflicting decisions, this chapter clarifies the scope and limits of student freedom of expression in the public schools.

Legal Issues

Student Expression

In *Tinker v. Des Moines*, the Court ruled that students do not "shed their Constitutional rights to freedom of speech or expression at the schoolhouse gate."[4] In hundreds of cases since then, every state and federal court has reaffirmed this basic principle. Clearly, the First Amendment still protects a student's controversial opinions.

According to the Supreme Court, "Students in school as well as out of school are...possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."[5] Since schools are "educating the young for citizenship," they should protect the "Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[6] Thus, in *Tinker* the Court ruled that students had the constitutional right to wear black armbands to public schools and to protest against American involvement in the Vietnam War.

The Court realized that protecting controversial speech might cause problems in schools. In fact, it recognized that "any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance."[7] According to the Court, "our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength...independence and vigor."[8]

Disruptive Speech

Despite the breadth of the *Tinker* decision, it also recognized that schools can legally limit student expression. In *Tinker*, the Court identified that limit when it wrote that any student conduct which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" is not protected by the constitutional guarantee of freedom of speech.[9] Thus, a federal appeals court allowed administrators to enforce a "no-button" rule in a Cleveland high school because evidence indicated that such symbols led to serious fighting between black and white students and substantially disrupted the educational process.[10]

Symbolic speech, however, cannot be prohibited merely because administrators are fearful or concerned about possible disruptions. As the Court stated: "Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[11] To restrict such expression, administrators must justify their actions based on evidence, not just intuition, that the forbidden expression would substantially interfere with the work of the school or the rights of others. They cannot prohibit a particular opinion merely "to avoid the discomfort and unpleasantness that always accompany an unpopular view."[12]

Principals do not have to wait until a disruption takes place to limit speech. In a case concerning a student demonstration inside a school, a judge explained that a school official may restrict student expression when there is significant evidence of a "reasonable likelihood of substantial disorder."[13] A similar result was reached in an Indiana case in which several students were suspended for distributing leaflets calling for a "school walkout." The judge ruled that student expression is not protected where administrators can demonstrate any facts which lead them to reasonably forecast substantial disruption.[14]

Obscene or Vulgar Speech

Courts have never protected student speech or writing that is obscene. Language is not legally obscene merely because it contains offensive, vulgar, or "dirty" words. To be legally obscene, material must violate three tests developed by the Supreme Court: 1) it must appeal to the prurient or lustful interest; 2) it must describe sexual conduct in a way that is "patently offensive" to community standards; and 3) taken as a whole, it "must lack serious literary, artistic, political, or scientific value."[15]

Can school administrators prohibit and punish vulgar and offensive speech that is not legally obscene or disruptive? In 1986, the Supreme Court answered this question in *Bethel v. Fraser*. The case involved a high school senior, Matthew Fraser, who was punished for giving a nominating speech at a school assembly that referred to his candidate using "an elaborate, graphic, and explicit sexual metaphor."[16] In *Bethel*, the Court ruled that school officials have broad authority to punish students for using "offensively lewd and indecent speech" in classrooms, assemblies, and other school-sponsored educational activities—even if the speech does not cause disruption and is not legally obscene. In addition, *Bethel* held that administrators have discretion to define and determine what constitutes vulgar and offensive speech.[17]

In a related 1996 case, Emily Heller was suspended from an Indiana high school for shouting that she was not a "fucking bitch" at a student who called her one. Heller argued that the suspension violated her free speech rights since the name-calling was not in an academic setting. But a federal court ruled that *Fraser* allowed schools to punish speech that is "plainly offensive" even if it does not occur during a school-sponsored event.[18]

School-sponsored Curricular Publications

The First Amendment gives very little protection to student freedom of the press in school-sponsored, curricular publications. This was the ruling of the U. S. Supreme Court in *Hazelwood v. Kuhlmeier*. The case involved a St. Louis high school principal who objected to two stories about pregnancy and divorce in a student newspaper that were written and published as part of a journalism course. The Court ruled that a curricular newspaper was not a public forum and that "school officials were entitled to regulate the contents…in any reasonable manner."[19]

The Court explained that when a student expresses personal, controversial views on school grounds, such views are protected by the First Amendment and the principles of *Tinker* apply. However, in school-sponsored publications or theatrical productions that are part of the school curriculum, educators may exercise greater control and set higher standards for student speech. Thus, the Court wrote that in a curricular publication, educators have broad discretion to prohibit articles that are "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[20] In short, the Court held that neither teachers nor administrators violate the First Amendment by "exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[21] The Court concluded that the principal in *Hazelwood* acted reasonably in deleting the controversial articles because of his concern that the articles were not sensitive to the privacy interests of the students, boyfriends, or parents who were mentioned.[22]

Hazelwood, however, does not permit educators to censor school-sponsored publications unless they have a valid educational purpose. Similarly, the Supreme Court has ruled that school boards do not have unlimited discretion to censor library books, to deny students access to ideas for narrowly partisan or political reasons or simply because the board dislikes the ideas contained in those books.[23]

Student-sponsored Underground Publications.

The Supreme Court decision in *Hazelwood* does not give school officials control over the style and content of underground student periodicals which are published without school sponsorship or support and are not part of the curriculum. Instead, *Tinker* governs such publications, and their distribution usually cannot be prohibited unless administrators have evidence to forecast that they will cause substantial disruption, interfere with the rights of others, or promote illegal activities. Thus, underground publications cannot be banned for discussing unpopular, sensitive, or controversial topics, and students cannot be punished merely for criticizing school officials or administrative policies in such publications.

Students may be required to submit their publications to administrators for review before distribution. The justification for allowing prior review of underground publications, explained one judge, is "to prevent disruption and not to stifle expression."[24] Most courts have prohibited schools from censoring publications through prior restraint without clear, objective standards and procedural safeguards.[25]

Recent Developments

Hazelwood has led to a variety of interpretations in state and federal courts. Some judges have interpreted *Hazelwood* broadly and supported restrictions on school-sponsored expression that was not related to the curriculum. For example, a divided federal appeals court ruled in favor of the Nevada principals who refused to print an advertisement by Planned Parenthood not only in the school newspaper and yearbook, which were published as part of the curriculum, but also in the athletic programs, which were not.[26] According to the court, schools retain the right to disapprove of ads that might carry a school-sponsored message to readers and put their imprimatur on one side of a controversial issue. Furthermore, some judges have interpreted *Hazelwood* to grant administrators broader control over curricular decisions than they had in the past.[27]

Other judges have interpreted *Hazelwood* more narrowly. One example is a case concerning restrictions on a peace group's participation in Career Day in Atlanta schools. Administrators argued that *Hazelwood* permitted them to control the content of the curricular programs and ban any group that criticized opportunities presented by other participants. However, a federal appeals court struck down the ban. It acknowledged that schools could decline to discuss military careers. If such a topic is discussed, the *Hazelwood* decision does not justify "allowing educators to discriminate" against a particular viewpoint.[28] Another federal decision that interpreted *Hazelwood* narrowly concerned a controversial student-written piece in a school-sponsored, noncurricular newspaper. The school argued that their authority to control the curriculum should include extracurricular or co-curricular activities such as the student paper, but the court disagreed. The judge declined to interpret *Hazelwood* broadly because it "opens the door to significant curtailment of cherished First Amendment rights." The court concluded that "educators may exercise greater editorial control over what students write for class than what they voluntarily submit to an extracurricular, albeit school funded, publication."[29]

A number of recent controversies involved student distribution of religious or political publications. Policies prohibiting distribution of such materials have been struck down. A Colorado case involved students who were suspended for giving out a Christian newspaper, *Issues and Answers*, in violation of a policy prohibiting distribution of "material that proselytizes a particular religious or political belief." The administrators argued that *Hazelwood* allowed them to prohibit distribution of such controversial publications, but the judge disagreed and explained: "Because students have a right to engage in political and religious speech," school policies that completely ban such publications "do not advance any legitimate government interest." Instead, by preventing students from discussing issues they feel are important, the policies inhibit their individual development and "defeat the very purpose of public education in secondary schools."[30]

On the other hand, content-neutral policies that simply regulate the time, place, and manner in which students can distribute publications are usually upheld. In another Colorado case that concerned *Issues and Answers*, students challenged school rules that prohibited distribution of newspapers in hallways. Since distribution was allowed in other school locations, and the restrictions were applied equally to all students, the restrictions were designed to maintain order, and were not based on the viewpoint of the publication; the court concluded that the policy did not violate student freedom of expression.[31] In another case challenging a policy that banned distribution of publications in school hallways (but allowed them elsewhere), a federal court ruled that reasonable restrictions "on the time, place, and manner of communicating nonschool speech" did not violate the First Amendment.[32]

In a related U. S. Supreme Court decision concerning the recognition of religious clubs, the Court upheld the Federal Equal Access Act, which prohibits public secondary schools from denying equal access to students who wish to meet on the basis of the "religious, political, philosophical, or other content" of the speech at such meetings. Concerning the fear that by permitting controversial speech, a school will appear to endorse it, the Court wrote: "We think that secondary students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits...."[33]

Although no public school in any state can provide less protection for student speech than required by the United States Supreme Court, individual states or school districts can provide more. Thus, in the aftermath of *Hazelwood*, a number of states—through statute or judicial interpretation—now have greater protection for student expression. In New Jersey, a state superior court ruled in favor of a student whose movie reviews for the school-funded extracurricular newspaper were censored because they reviewed R-rated films that the principal considered "inappropriate for junior high students." Judge Francis stated that, if he were to decide the case under the United States Constitution, he would be compelled to declare, that the school's action was constitutional under the test laid down by the United States Supreme Court in *Hazelwood*. However, he ruled that the school violated the student's rights under the New Jersey Constitution, which is "more expansive than the First Amendment" and "indicates that free speech is an affirmative right."[34]

In other states, student expression is protected by statute. For example, the California Education Code states: "Students of the public schools shall have the right to exercise freedom of speech and of the press...whether or not such publications...are supported financially by the school...."[35] As a result, a California court ruled in favor of a student who wrote a controversial article in a school newspaper. In explaining his decision, the judge wrote: "The broad power to censor expression in school-sponsored publications for pedagogical purposes recognized in *Kuhlmeier* is not available to this state's educators."[36] In Massachusetts, the law states: "The right of students to freedom of expression in the public schools of the Commonwealth shall not be abridged provided that such right shall not cause any disruption or disorder...."[37] Similarly, Colorado law protects freedom of expression and prohibits prior restraint in student publications whether or not such publication is school sponsored.[38]

While *Hazelwood* confirmed administrative control over curricula-related activities, *Tinker* continues to govern controversies concerning students' personal views. Thus, a federal appeals court ruled that high school students had the right to wear "antiscab" buttons to protest plans to replace striking teachers. In cases involving nondisruptive political speech, the judge wrote that courts must "insure that robust rhetoric...is not suppressed by prudish failures to distinguish the vigorous from the vulgar."[39] Similarly, a federal judge ruled that a policy allowing an elementary principal to prevent distribution of any material he considered controversial was unconstitutional.[40] The principal used the policy to prevent a student from giving classmates invitations to a church party. However, one 1996 decision questioned whether *Tinker* applies to elementary schools. "Age," wrote the judge, "is a critical factor in student speech cases" and the Court "has not suggested that fourth-graders have the free expression rights of high school students."[41]

Recommendations for Practice

Three Supreme Court decisions—*Tinker*, *Bethel*, and *Hazelwood*—have summarized and explained the constitutional principles that apply to student expression in the public schools. What emerges from these and more recent rulings is a sense that the First Amendment applies broadly to a student's personal views and narrowly in areas that are considered part of the curriculum.

- When a student speaks or writes as an individual, such expression is protected by the First Amendment and cannot be restricted unless it causes substantial disruption or interferes with the rights of others. Students may not be punished for expressing their personal opinions about controversial political, religious, social, or educational issues—even if their views are unpopular and in conflict with the ideas of most students, teachers, and administrators.
- Administrators have always had broad discretion in regulating student speech or writing that was part of the school curriculum. Recent Supreme Court decisions have clarified the scope of such control. In *Bethel*, the Court ruled that educators can define and punish vulgar and offensive language in classrooms, assemblies, and probably in any other educational activity. In *Hazelwood*, the Court held that educators may exercise broad editorial control over curricular publications and plays when there are legitimate educational reasons for doing so. In addition, educators in most states can control student publications that are not part of the formal curriculum if they are school-sponsored, teacher-supervised, educational activities.
- Administrators usually may control student speech in curricular activities—even if the student's views are not disruptive or obscene and do not interfere with the rights of others. In such cases, courts will tend to presume that administrative control is valid, and it will probably be upheld unless students can prove that the school's control or punishment of their views was unreasonable, arbitrary, or unrelated to legitimate educational goals.
- It is not clear whether courts will apply the principles of *Hazelwood* or *Tinker* to school-sponsored extra-curricular activities. Therefore, to be constitutionally safe, cautious administrators should follow *Tinker* more than *Hazelwood* in establishing policies governing school-sponsored publications that are not part of the curriculum.

- Since some states provide greater protection for students' rights than *Hazelwood* requires, principals should check relevant state statutes and regulations, judicial opinion, and district policies before developing school rules or imposing punishments that restrict student expression.
- Related to the right to speak is the right to remain silent—especially in matters of conscience. Thus, schools may not require students to salute the flag or stand at attention while the flag is being saluted.[42]
- Schools cannot ban student distribution of publications because they advocate a particular religious, political, or social view. However, administrators can establish policies that regulate the time, place, and manner for distributing materials in the schools. Such rules must be viewpoint neutral and cannot be so restrictive that they prevent the dissemination of student opinions.
- Administrators should distinguish between what they have authority to do legally and what it is wise to do educationally. For example, *Hazelwood* probably allows schools to censor all articles in curricular publications. But this, of course, does not mean that censorship is the best way to train students to exercise their First Amendment rights in a fair and responsible manner.[43]

References

[1] Tinker v. Des Moines, 393 U.S. 503 (1969).
[2] Bethel Sch. Dist. No. 403 v. Fraser, 106 S. Ct. 3159 (1986).
[3] Hazelwood Sch. Dist. v. Kuhlmeier, 108 S. Ct. 562 (1988).
[4] *Tinker*, 393 U.S. 503, at 506 (1969).
[5] *Id.* at 511.
[6] *Id.* at 507.
[7] *Id.* at 508.
[8] *Id.* at 508-509.
[9] *Id.* at 513.
[10] Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).
[11] *Tinker*, 393 U.S. 503, at 508 (1969).
[12] *Id.* at 509.
[13] Karp v. Becken, 477 F.2d 171 (9th Cir. 1973).
[14] Dodd v. Rambis, 535 F. Supp. 23 (S.D. Ind. 1981).
[15] Miller v. California, 413 U.S. 15 (1973).
[16] *Bethel*, 106 S. Ct. 3159 a t 3160 (1986).

[17] For more on *Bethel, see* D. SCHIMMEL, *Lewd Language not Protected: Bethel School District v. Fraser*, 33 EDUC. L. REP. 999 (1986).

[18] Heller v. Hodgin, 928 F. Supp. 789 (S.D. Ind. 1996).

[19] *Hazelwood*, 108 S. Ct. 562, at 569 (1988).

[20] *Id*. at 570.

[21] *Id*. at 571.

[22] Comments about *Hazelwood* in this chapter are based on D. SCHIMMEL, *Censorship of School-Sponsored Publications: An Analysis of Hazelwood v. Kuhlmeier*, 45 EDUC. L. REP. 941 (1988).

[23] Board of Education, Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982).

[24] Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960 (5th Cir. 1972).

[25] In *Hazelwood* 108 S. Ct. 562, at 571 (1988) (the Supreme Court ruled that school officials could control school-sponsored publications without specific written regulations. But it declined to decide whether such regulations "are required before school officials may censor publications not sponsored by the school." Since several federal appeals courts have required that schools have written due process safeguards in reviewing underground publications, such regulations continue to be required in the absence of a Supreme Court ruling to the contrary).

[26] Planned Parenthood v. Clark County School Dist., 941 F.2d 817 (9th Cir. 1991).

[27] Virgil v. School Bd. of Columbia County, Fla., 862 F.2d 1517 (11th Cir. 1989).

[28] Searcey v. Harris, 888 F.2d 1314, 1324 (11th Cir. 1989).

[29] Romano v. Harrington, 725 F. Supp. 687 (E.D.N.Y. 1989).

[30] Rivera v. East Otero Sch. Dist., R-1, 721 F. Supp. 1189, 1194 (D. Colo. 1989).

[31] Hemry by Hemry v. School Bd. of Colorado Springs, 760 F. Supp. 856 (D. Colo. 1991).

[32] Nelson v. Moline Sch. Dist. No. 40, 725 F. Supp. 965 (C.D. Ill. 1989)

[33] Board of Educ. of Westside Community Sch. v. Mergens, 110 S. Ct. 2356, 2360 (1990).

[34] Desilets v. Clearview Regional Bd. of Educ., Superior Court of New Jersey, Gloucester County No. C-23-90, May 7, 1991. Article I, Paragraph 5 of the New Jersey Constitution states: "Every person may freely speak, write, and publish his sentiments."

[35] California Education Code, § 48907 (1991).

[36] Leeb v. DeLong, 243 Cal. Rptr. 494, 498 (Cal. App. 1988).

[37] General Laws of Mass., Chpt. 71, § 82 (1991)

[38] Colorado Revised Statutes § 22-1-120(1) (1990).

[39] Chandler v. McMinnville Sch. Dist., 978 F.2d 524 (9th Cir. 1992).

[40] Johnston-Loehner v. O'Brien, 859 F. Supp. 575 (D.M. Fla. 1994).

[41] Muller by Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530 (7th Cir. 1996).

[42] Lipp v. Morris, 579 F.2d 834 (3d Cir. 1978).

[43] This chapter is based on material from FISCHER, SCHIMMEL and KELLY, TEACHERS AND THE LAW, Ch. 9 (5th ed. 1999).

3

Student Discipline

Richard S. Vacca

Introduction

Most of today's public school systems have formal policies and rules specifically covering student discipline. Generally, such documents, often referred to as "Student Codes of Conduct," specify the nature and severity of the student offense and include the alternatives of punishment available for each. Carefully written to avoid vagueness, these documents typically enumerate the procedures to be followed in dealing with student offenders and often designate the person(s) responsible for enforcing each rule and implementing each procedure.

In enforcing a public school system's disciplinary code, the severity of the punishment of a student is an important factor to consider.[1] Generally, the more serious the punishment—an expulsion from school rather than a one-day suspension—the more formalized and extensive are the requirements of procedural due process. For example, the Seventh Circuit held that a high school senior who had been suspended from school because of drinking for three days and subsequently missed final exams and did not graduate, was not entitled to the same level of due process as was a student being expelled from school.[2] Courts have consistently held that confrontation and cross-examination of witnesses against a student, and a student's representation by counsel may not be mandatory though "desirable when the possible discipline of a student is severe."[3] The age of the student or student group will affect the formality of the procedural due process to be afforded.[4] In addition, whether or not a student is one who has an educational disability will impact the nature of the process.[5]

Legal Issues

Basic fairness is the rationale of contemporary procedural due process. Fairness should undergird every decision made by a governmental entity, especially public schools. Over the past 30 years, courts have been very active in extending to public school students due process rights under the United States Constitution when they are involved in disciplinary situations.

Corporal Punishment

An age-worn mode of student punishment available in public schools is corporal punishment, the affliction of physical pain upon a student for misconduct. The legal justification for using corporal punishment is found in state statutes. Some states specifically allow it, some states forbid it, while others do not mention it but by implication authorize or allow its use. The law on corporal punishment has not changed significantly in recent years, and both federal and state courts consistently upheld its reasonable use where the state allowed it. However, a growing number of states and localities now forbid its use. At this time more than 20 states forbid corporal punishment in public schools.

Where corporal punishment is used, it must conform to the laws of the state, to local school board policy, and to the common law standard of reasonableness. Courts have, over the years, spelled out nine general guidelines as to what constitutes reasonable corporal punishment. These guidelines suggest that corporal punishment:

- Must be allowed by state statute (either directly or by inference).
- Must be implemented consistent with state statutory requirements.
- Must be used as a method of correction.
- Must not be cruel or excessive.
- Must not involve anger or malice.
- Must suit the age, sex, and physical condition of the child.
- Must involve use of an appropriate instrument.
- Must not leave permanent or lasting injuries.
- Must be appropriate for the offense.[6]

Baker v. Owen[7] was the first case in this area to come before the United States Supreme Court. It allowed teachers to administer corporal punishment and did not require prior parent approval for such punishment. The following four procedural guidelines were approved in the decision: students were warned in advance of the specific kinds of behavior that could result in their being corporally punished, corporal punishment was not to be the "first-line" of punishment, when corporal punishment was administered to a student a second school official was present to witness the act, and parents of a punished student were furnished a written statement on request about the act including reasons for it and the names of the witnesses.

In *Ingraham v. Wright*[8] the United States Supreme Court decided that the use of corporal punishment in a public school does not fall within the Eighth Amendment's prohibition regarding cruel and unusual punishment. The Eighth Amendment applies only to situations involving criminal punishments. The Court held further that a student is not entitled to notice and a hearing prior to corporal punishment. In the Court's opinion, if children are subjected to unreasonable applications of corporal punishment they may obtain remedy by filing a civil suit.[9]

Hall v. Tawney[10] was a post-*Ingraham* case decided by the Fourth Circuit. The court in *Hall* faced three basic issues: the legality of corporal punishment, the procedural due process guarantee of a hearing prior to the punishment, and the student's constitutional right to ultimate body security. To the Fourth Circuit, corporal punishment does not violate a child's protected rights. However, the force used by a disciplinarian must not be disproportionate to maintaining order and discipline in the school, nor should it be the product of malice, sadism, or brutality. The court believed that not every violation of state tort law or criminal assault law amounts to a violation of a constitutional right. In *Hall*, the court did treat the substantive due process issue of a student's right to ultimate body security, and held that this right applies to situations of corporal punishment.

Two years later, the Supreme Court of West Virginia addressed the procedural guarantees available to students in that state prior to the administration of corporal punishment. According to the court, the following minimal due process procedures should be utilized: a student should be given an opportunity to explain his version of the disruptive event "as such an explanation may convince a fair-minded person that corporal punishment is not warranted," and absent some extraordinary factor, the administration of corporal punishment should be done in the presence of another adult, "to protect both the student and the person administering corporal punishment by providing a neutral observer."[11]

Exclusion From School

Generally, state statutes grant school administrators the legal duty to establish, maintain, and protect the school's learning environment. It is a basic tenet of school law that school authorities may exclude from school any student whose conduct interferes with or in any way disrupts the operation of the school; or who openly defies school rules, or whose conduct is willfully insubordinate; or who poses a threat of harm to himself, to other persons, or to school property.[12]

The terms used to characterize exclusion of students from school are suspension and expulsion. Generally, suspension denotes a temporary exclusion from school with a presumption that return to school is possible. Typically, by state code provision, school authorities possess the legal prerogative to suspend students from classes and from school.[13] Expulsion denotes a longer term of exclusion from school with a presumption of finality regarding the termination of one's status as a student. Considered the most severe student punishment available to school authorities, state statutes and local policies usually provide that only a local school board has the prerogative to expel a student.[14]

In recent years, litigation has involved both the right of school authorities to suspend or expel, and the minimal procedural due process rights of students prior to suspension or expulsion. Following the landmark decision in *Gault*,[15] in which the Supreme Court held that minor juvenile offenders in juvenile court were entitled to certain procedural due process protections, several lower courts began to clarify the procedural due process rights of students facing exclusion from school. The matter was ultimately treated by the United States Supreme Court in *Goss v. Lopez*.[16]

Observing that a student possesses a property right to a public education, protected by the guarantees of the Fourteenth Amendment, the Supreme Court overturned an Ohio statute which allowed summary suspensions for up to ten days. In the Court's opinion, minimum procedures must be followed prior to exclusion from school. The Court held that in suspensions of ten days or less, notice of the charges and the right to be heard are required. And, if the student denies the charges, he or she must be informed of the evidence against him or her and be given the opportunity to present his or her side of the story.[17] However, this requirement can be done informally and immediately after the incident. In *Goss*, the Court did not require that a public school system allow students to be represented by counsel, to present witnesses, or to confront and cross-examine witnesses. Nor did the Court rule on the elements of due process for suspensions of longer than ten days. The Court did observe that more procedural due process may be needed for longer suspensions.[18]

Of major importance to the daily practice of school administrators is the Court's attitudes toward due process and school discipline, often missed by those who analyze this landmark case. First, the Court reemphasized the notion that procedural due process is a flexible legal standard, determined by the nature of the misconduct and the severity of the penalty. Second, the Court held that school officials are free to remove a student from school prior to a suspension if his or her presence is a danger to persons or property and/or is disruptive to teaching and learning.[19]

Beyond the guidelines of the Supreme Court, a local school administrator is also bound by state statutory mandates and state court decisions, and these requirements vary. However, the following guidelines are generally accepted nationally and serve as excellent guidelines for school administrators:

- students must know in advance what standards of behavior are proscribed in their school and what modes of behavior are expected;
- they must know what specific disciplinary actions and punishments attach to violations of the rules;
- they must receive immediate and informed notice when they are accused of an infraction and an opportunity to present his or her side of the story; and
- students must have an opportunity to appeal the decision to another administrative level within the school system.

The administrator is reminded that these general elements become more formalized and technical when an expulsion is in process.[20]

Two other student exclusion decisions from the United States Supreme Court should be briefly mentioned at this point because of their bearing on student procedural due process entitlements. The cases are *Wood v. Strickland*,[21] and *Carey v. Piphus*.[22] *Wood* involved the issue of students being allowed to sue local school board members for damages under Section 1983 for a denial of procedural due process in an expulsion hearing. In upholding the school board's actions, the Supreme Court held that individual board members could be sued if they knew or reasonably should have known that they denied students their constitutional rights or if board members acted with malicious intent.[23]

Carey was a consolidation of two cases, both involving the suspension of a student from school. One student had violated a rule prohibiting the use of drugs at school, while the other student violated a rule against males wearing earrings at school. In rendering its decision in *Carey*, the Supreme Court held that students suspended from school without procedural due process are entitled to recover nominal damages of $1.00 and possibly extensive lawyers' fees. However, before any compensatory damages are awarded, a student must first submit proof of actual injury caused by the denial of due process. Punitive damages may be possible where a student can establish that school officials acted with the malicious intent to deprive him/her of his/her rights.[24]

The Relevance of a Miranda-type Warning

Currently, other possible elements of procedural due process are being clarified in the courts. One such element concerns whether or not a student is entitled to a *Miranda* warning prior to being questioned by school authorities. This element would require school authorities to advise a student of his or her rights as a police officer must do prior to arresting a criminal suspect. In *Boynton v. Casey*,[25] a high school student was subjected to questioning by his school principal and vice-principal concerning the use of marijuana on school premises. During the one-hour questioning session, the student was denied permission to leave and was not informed of his right not to answer questions, nor was he allowed to have his parents present at the questioning. Admitting that he used marijuana on school property, Boynton was immediately suspended.

Subsequently, in federal district court, Boynton and his parents alleged that by refusing their son permission to leave the initial questioning session, failing to advise him of his right to remain silent, failing to notify him that he had a right to have his parents present during questioning, and failing to notify his parents of the questioning; school officials denied him procedural due process. In dismissing the complaint for failure to state a federal constitutional claim upon which relief can be granted, the court held: the student was not entitled to *Miranda* warnings to being questioned by school authorities, and there was no requirement that the authorities notify the student and his parents of a right to have the parents present during questioning.[26]

Suspension and Expulsion of Students With Disabilities

In 1988 the United States Supreme Court held, among other things, that the "stay put" provision of the Education of All Handicapped Children Act, retitled in 1990 as the Individuals with Disabilities Education Act (IDEA, 1997), prohibits state and local school authorities from *unilaterally* excluding disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities during the pendency of a review proceeding.[27] The Court stated that school authorities may use procedures (including a suspension for up to ten school days) to deal with students who pose immediate danger to themselves or others, or who cause substantial disruption of classrooms or the school.[28] In 1997, the reauthorized IDEA added an option of placing a student in an interim alternative education setting (IAES) for 45 days for such offenses as possession of weapons or drugs. A student may be placed in an IAES for more than 45 days, or have his/her program changed, but the procedural requirements of IDEA must be followed.[29] This reauthorized IDEA added specific provisions detailing procedures required to ensure fairness in the discipline of students with disabilities.

Recommendations for Practice

Contemporary public school administrators would be wise to adhere to the following guidelines from case law as they carry out their daily disciplinary routines:

- The legal duty to control a school must be balanced with the procedural due process entitlements of students.
- Due process is neither a fixed nor stagnant concept since it changes from situation to situation and is dependent upon a continuum of factors.
- Fairness is the rationale of contemporary procedural due process in public schools.
- The technicalities of criminal procedure including *Miranda*-type warning, presence of an attorney, and confrontation and cross-examination of witnesses do not automatically transfer into school disciplinary procedures.
- Timely and adequate notice, an explanation of the charges against the student, and a chance to be heard are the minimal elements of procedural due process in student disciplinary episodes.
- Procedural due process requires school administrators to be predictable and consistent and to exercise caution, thoughtful restraint, and common sense when disciplining students.
- Student discipline must incorporate several alternative sanctions for misbehavior which were previously announced to students and their parents, and directly linked to modes of misbehavior, and it must follow the dictates of reasonableness.
- Students who represent an imminent threat of harm to themselves or others or who disrupt the school or its classrooms should be dealt with immediately with appropriate sanctions.
- Students who are covered by the Individuals with Disabilities Education Act (1997), and whose misbehavior is a manifestation of their disability, are not automatically under a school system's suspension and/or expulsion process as applied to general education students. These students have additional

protection afforded under Section 504 of the Rehabilitation Act (1973) to ensure fairness and equity of treatment.

- Suits for damages may result if administrators knew or should have known that their actions violate the procedural due process entitlements of their students.

References

[1] "In school discipline cases the nature of the sanction affects the validity of the procedure used in imposing it,..." *Schools*, 68 AM. JUR.2d § 269-291. More recently, a seventh grade mathematics teacher found himself in court for using excessive disciplinary measures on a student who "coughed out loud" in class. Jones v. Witinski, 931 F. Supp. 364 (M.D. Pa 1996). *See also* Kolesmick By and Through Shaw v. Omaha Public Sch., 558 N.W.2d 804 (Neb. 1997) (where the court found no disparity between a two-semester expulsion and a student's knowing possession of a knife on school grounds). The reader is reminded that matters of academic discipline are treated differently from matters of discipline for misbehavior. *See, e.g.*, Moore v. Hyche, 761 F. Supp. 112 (N.D. Ala. 1991), and State v. McHenry, 915 S.W.2d 325 (Mo. 1995).

[2] Lamb v. Panhandle Community Unit Sch. Dist. No. 2, 826 F.2d 526 (7th Cir. 1987). For another case concerning the issue of the severity of the expulsion as an "unfair punishment" *see* Adams v. City of Dothan Bd., 485 So. 2d 757 (Ala. Ct. Civ. App. 1986). *See also*, Bivens v. Albuquerque, 899 F. Supp. 556 (D.N.M. 1995); Donovan v. Ritchie, 68 F.3d 14 (1st Cir. 1995); and Obersteller v. Flour Bluff, 874 F. Supp 146 (S.D. Tex. 1994) (for a case involving the lowering of a student's grade).

[3] Schools, *supra* note 1, at 597. *See also,* Newsome v. Batavia, 842 F.2d 920 (6th Cir. 1988) (it was held that an expelled student was not entitled, as a matter of right, to the names of student accusers; nor was he entitled to cross-examine the administrators who investigated his situation).

[4] *Id.* at 593. In Coplin v. Conejo Valley, 903 F. Supp. 1377 (C.D. Cal. 1995) (the court held that a right to the names of females alleging sexual harassment did not exist in a preexpulsion hearing).

[5] Honig v. Doe, 108 S. Ct. 592 (1988). 20 U.S.C. § 1415(k). For more recent cases on this point, *see* Magyar v. Tucson Unified, 958 F. Supp.2d 1423 (D. Ariz 1997), Springer v. Fairfax County (Va.) Sch. Bd., 134 F.3d 659 (4th Cir. 1998), and Gad-

son City Board of Educ. v. B.P., 3 F. Supp.2d 1299 (N.D. Ala. 1998).

[6] Portions of this chapter are adapted from H. C. HUDGINS and R. S. VACCA, LAW AND EDUCATION: COMTEMPORARY ISSUES AND COURT DECISIONS, 345-351 (rev. 5th ed. 1999).

[7] Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd* 423 U.S. 907 (1975).

[8] Ingraham v. Wright, 430 U.S. 651 (1977). *See also,* Johnson v. Rosendez, 993 S.W.2d 723 (Tex. Ct. App. 1999).

[9] *Id. See, also* Harris v. Tate City, 882 F. Supp.90 (N.D. Miss. 1995).

[10] Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980). For another case showing the criminal prosecution of a private school principal for excessive paddling of a student *see* Commonwealth v. Douglas, 588 A.2d 53 (Pa. Super. Ct. 1991).

[11] Smith v. West Virginia State Bd., 295 S.E.2d 680 (W. Va. 1982). For more cases involving corporal punishment issues *see* Wise v. Pea Ridge Sch. Dist., 855 F.2d 560 (8th Cir. 1988), Lillard v. Shelby County, 76 F.3d 716 (6th Cir. 1996) (where it was said that a single slap does not rise to the level of a constitutional violation); Holbrook v. Commonwealth, 925 S.W.2d 191 (Ken. 1996) (where a teacher paddled a fourth grade student for failing to complete an assignment); Spacek v. Charles, 928 S.W.2d 88 (Tex. Ct. App. 1996) (where athletic coaches were charged with using "excessive force);" Daniels v. Gordon, 503 S.E.2d 72 (Ga. Ct. App. 1998); and Saylor v. Board of Educ., 118 F.3d 507 (6th Cir. 1997).

[12] HUDGINS and VACCA, *supra* note 6, at 289-90. School administrators must be cautious when dealing with a student who is covered by special education law who has been mainstreamed into the school, *Honig*, 108 S. Ct. 592 (1988). *See, also* A. G. OSBORNE, JR., DISCIPLINING OPTIONS FOR STUDENTS WITH DISABILITIES, and supplement (E.L.A. 1997).

[13] *Id.*

[14] *Id.*

[15] *In re* Gault, 387 U.S. 1 (1967).

[16] 419 U.S. 565 (1975). For cases involving minimal procedural requirements necessary in an expulsion proceeding *see* Carey on Behalf of Carey v. Maine Sch. Admin. Dist., 754 F. Supp. 906 (D. Me. 1990), and Meyer v. Austin Indep. Sch. Dist., 167 F.3d 887 (5th Cir. 1999).

[17] *See also* Newsome v. Batavia Local Sch. Dist., 842 F.2d 920 (6th Cir. 1988).

[18] *Id.*

[19] *Id.*

[20] *See, e.g.*, New Braunfels Indep. Sch. Dist. v. Armke, 658 S.W.2d 330 (Tex. Ct. App. 1983). School officials are warned that a court of law will nullify a policy or rule if its wording is vague, Claiborne v. Beebe, 687 F. Supp. 1358 (E.D. Ark. 1988); and, it should be reemphasized that students covered by special education law may create an exception to this rule. For another example of the application of the vagueness rule, *see* Lanham *ex rel.* Smith v. Green County, 100 F. Supp.2d 1354 (M.D. Ga. 2000). *Honig*, 108 S. Ct. 592 (1988). (It also should be reemphasized that students covered by special education law may create an exclusion to this rule) *See* the reauthorized and amended version of the Individuals With Disabilities Education Act, at 20 U.S.C. § 615 *et. seq.* (1997). *See, e.g., Nathan R. v. Board of Educ., 199 F.3d 377 (7th Cir. 1999).*

[21] Wood v. Strickland, 420 U.S. 308 (1975).

[22] Carey v. Piphus, 435 U.S. 247 (1978).

[23] *Wood*, 420 U.S. 308. For a comprehensive look at the liability of public school administrators under 42 U.S.C. § 1983, *see* R. S. Vacca and H. C. Hudgins, Jr., Liability Of School Officials And Administrators For Civil Rights Torts (1982). For a recent case involving the issue of liability under 42 U.S.C. § 1983, *see* Wyke v. Polk County School Board, 129 F.3d 560 (11th Cir. 1997) (a case involving the suicide of a middle school student).

[24] *Carey*, 435 U.S. 247 (1978).

[25] 543 F. Supp. 995, (D. Me. 1982).

[26] *Id.* For additional cases *see* Keough v. Tate, 748 F.2d 1077 (5th Cir. 1984) (involving the issue of pre-suspension due process); Pollnow v. Glennon, 594 F. Supp. 220, *aff'd* 757 F.2d 496 (2d Cir. 1985) (involving the issue of whether a student would be advised that he can call his mother); Brewer by Dreyfus v. Austin Indep. Sch. Dist., 779 F.2d 260 (5th Cir. 1985) (involving the issue of whether or not criminal procedure is transferred into school procedure); New Jersey v. T.L.O., 105 S. Ct. 733 (1985) (where the Supreme Court held that a standard of "reasonable suspicion" applied to school searches of students and their belongings, and not the police standard of "probable cause"); State v. Moore, 603 A.2d 513 (N.J.Super.Ct. App. Div. 1992) (for a case showing the *reasonable suspicion* standard as being a lesser standard than that of "probable cause"); and Davis v. Churchill County Sch. Bd., 616 F. Supp. 1310 (D. Nev. 1985) (concerning whether suspension hearing may be

closed to the public). *See also,* S.A. v. Indiana, 654 N.E.2d 791 (Ind. Ct. App. 1995) (where the reasonable suspicion versus probable cause standards are compared); and C.B. v. Driscoll, 82 F.3d 383 (11th Cir. 1996) (where the reliability of informants in a school search situation is an issue).

[27] *See Honig*, 108 S. Ct. 592 (1988) (involving procedural issues in possible suspension or expulsion of students with disabilities in public schools).

[28] *Id*. at 605. *See also* Kaelin v. Grubbs, 682 F.2d 595 (6th Cir. 1982), and *Gadson*, 3 F. Supp.2d 1299 (N.D. Ala. 1998). Public school officials will be wise to review all changes in the revised IDEA (1997), at 20 U.S.C. § 601, *et. seq*. For two excellent articles on this point, *see* B. DOWLING-SENDOR, *Wiggle Room in IDEA*, 185 NAT. SCH. BD. J. 14 (March 1998), and B. WILLAMS and A. KATSIYANNIS, *The 1997 IDEA Amendments: Implications for School Principals*, 82 NASSP BUL. 12 (January, 1998).

[29] 20 U.S.C. § 1415 *et. seq.*

4

Discipline Hearings and Due Process

Jeffrey J. Horner

Introduction

Discipline in public schools has proven to be a matter of paramount importance in present day education. Courts have attempted to balance the students' constitutional protections from arbitrary and excessive discipline against the need for school officials to maintain order and discipline in the school setting. For the most part, courts have been tolerant of school officials who give advance notice of prohibited behavior and administer punishment in a reasonable manner, consistent with the due process rights enjoyed by the student.

An important element in discipline is recognizing the difference courts have delineated between severe and minor disciplinary actions. Courts continually recognize that more expansive due process is required for students subject to expulsion or long-term suspension (usually eleven days or more), as opposed to those students receiving lesser punishment. The need for school districts to recognize and satisfy these legal requirements is imperative to ensure that due process is provided.

Legal Issues

In general, students have the right to freedom from bodily restraint cognizable under the Fourteenth Amendment of the United States Constitution.[1] This right does not extend so far as to implicate the Eighth Amendment prohibition on cruel and unusual punishment.[2] The courts have held that the Eighth Amendment applies only in the criminal context, not student discipline proceedings.[3] With respect to the Fourteenth Amendment concern, courts have recognized the rights of students to be informed of prohibited behavior and afforded certain procedural safeguards prior to the imposition of punishment. The extent of these procedural rights was the primary focus of *Goss v. Lopez*.[4] Decided in 1975, *Goss* has been the leading case in the student due process area for over twenty-five (25) years. *Goss* held that, in the event of minor disciplinary infractions calling for suspensions of ten days or less, a student must only be afforded the opportunity to tell one's side of the story before punishment is opposed. This opportunity is the "hearing" envisioned under *Goss* for minor disciplinary infractions. The scenario changes significantly for long-term suspensions of eleven days or more and expulsions. More thorough due process is required before imposing these punishments. The procedures for expulsions vary between states, and an administrator should consult his/her state statutes for precise requirements.

Gathering of Information Concerning the Infraction

Generally, the first step in a student discipline case involves securing information about the infraction. Most often a complaint of student misconduct comes from a teacher, school administrator, or student. A teacher may see students fighting on the playground. The teacher would then report this incident to the proper authority. Any information gathered about a possible infraction should be communicated to the person in charge of discipline at that school, usually a principal or assistant principal. It then becomes incumbent upon that administrator to move forward with an investigation.

Completing the Investigation of the Allegations

After receiving a report of a possible disciplinary infraction, it is usually standard procedure for an administrator to conduct a further investigation. One of the first parts of this investigation should be to talk to the accused student and to determine if he or she committed the acts in question. The student should always be given the opportunity to relate his or her account of the allegations. The student may agree with the facts stated by the administrator, thereby essentially confessing to the wrongdoing. If this occurs, the administrator is in a position to immediately recommend the appropriate punishment for the infraction. In many cases, a student will disagree with the facts related by the administrator. In this case, the administrator should make further inquiry of other witnesses to ascertain the facts concerning the event. If two views exist of the incident in question, the administrator may believe whomever he or she feels is the most credible.

Ascertaining Whether the Misconduct Warrants Minor or Severe Punishment

Perhaps the most important step in the disciplinary process from a due process perspective is for the administrator to determine the nature of the punishment. If it is determined the incident warrants short-term suspension or other minor punishment, then such punishment can be immediately imposed by the administrator. The process of affording a student the opportunity to tell his or her side of the story is the only "hearing" contemplated in *Goss* for minor disciplinary infractions. Written notice should be sent to the student and the student's parents or guardians, describing the nature of the misconduct and the punishment to be imposed. Absent applicable state statutes or administrative regulations, a further appeals process is not legally required; however, to be fair to all involved, many school districts allow an appeal to a higher level, such as the superintendent or his designee.

In some instances, however, the investigation may reveal a more serious violation of school policy. If the proposed punishment for an infraction is expulsion or suspension for eleven days or more, a student is entitled to more thorough due process. The punishment cannot be immediately imposed. First, a letter should be sent to the student's parents, outlining the charges against the student and informing them of the student's rights under the appropriate school policies and law. Copies of all applicable policies should be attached. Next, it must be determined whether the student or parents desire a hearing on the charges. If such hearing is requested, a letter notifying them of the hearing date, the administration's witnesses, and the nature of the witnesses' testimony in sufficient detail to prepare a defense should be sent to the parents and student. All letters should be hand delivered or sent by certified mail to make certain that the notice is received.

Preparing for the Hearing—Expulsion or Long-Term Suspension

Many state statutes require that expulsion or long-term suspension hearings be held before a school board. Statutes in other states allow designees of the school board, usually school administrators, to hear these cases. All parties are generally best served if the school principal or other administrator conducts the initial hearing. Several benefits are attained by having the initial hearing before a building administrator. First, such hearings are appropriate administrative functions. Second, holding the hearing before the administrator provides due process at the earliest time and at the lowest possible administrative level. Because a student is entitled to an impartial hearing, the administrator acting as "the judge" should avoid becoming overly involved in investigating the case prior to the hearing. If the administrator acting as a hearing officer becomes actively involved in the investigation, he or she should request that the superintendent appoint another administrator to hear the matter because the administrator could become a witness in the case.

Conducting the Hearing

At the expulsion or long-term suspension hearing, the administration has the burden of going forward and proving its case by a preponderance of the evidence. Because student disciplinary cases are not criminal actions, the higher burden of proof associated with criminal actions (beyond a reasonable doubt) does not apply. The administration must prove that the student violated a school rule which warrants expulsion or long-term suspension. Generally, it is not necessary for a school district attorney to be present unless the student has an attorney. Also, the hearing should be tape recorded or transcribed by a court reporter to maintain a record for future use. Court reporters are much more expensive than tape recorders. In most instances, a good tape system will suffice to preserve a record of the hearing. A court reporter should be used only if the case is particularly complex and is likely to be appealed.

The first step of the hearing process is for the hearing officer to state the ground rules. He or she may read an outline of the proceedings, which should be provided to everyone in attendance so that all are apprized of the rules. The administration will begin the proceedings by presenting its case. The student or representative may be allowed to cross-examine witnesses presented by the administration. Time limits on cross-examination generally are not a good idea. Such limitations simply raise the specter of unfair treatment and violation of due process. The hearing officer may, however, require that the testimony be relevant and not repetitive or cumulative. Both the administration and the student may seek to sequester witnesses. This option simply means that each witness, other than parties to the case, may be required to remain outside of the hearing room until his or her testimony is given.

After the administration has presented its witnesses and documentary evidence, the student should then present his/her case. Again, time limits should not be placed on the student's presentation. After the student has presented his/her case, the hearing officer should allow rebuttal evidence and closing arguments. After the presentation of arguments, the administrator may render a decision at that time or may reserve the right to render the decision at a future date. The decision should have two parts. The first finding should state whether the student engaged in prohibited behavior, and the second finding (if necessary) should specify the appropriate punishment. Any decision made by the administrator should be confirmed in writing. This notification letter should inform the parents or guardians of the decision and the right of appeal to the next administrative level.

The Processing of the Initial Decision

After a student has been afforded a hearing, generally no further appeals process is legally required, except by statute. Many states require that such an appeals process be afforded to students. It is probably a good idea to allow an appeal so that the concept of fundamental fairness is observed. In most cases, an appeal of an expulsion or long-term suspension is directed to the local school district board or its designee. An appeal to the board can be based on either the record made before the school administrator or new evidence presented to the board. To save time, expense, and repetitive testimony, an appeal based on the record is preferable. The board may then either listen to the tape recordings or read the transcript of the initial proceedings and review any documents. Each side should be given an equal amount of time to present oral arguments based on the record.

Based on a review of the record and the arguments of both parties, the board should make its ruling. The board should adopt specific findings of fact and conclusions of law similar to those made by the school administrator. It may make its decision either at the time of the hearing or at a later date. Any decision should be confirmed in writing and sent to the student and parents. The board should also pass a motion confirming its decision.

Further Appeal Outside the School District

If the punishment imposed by the board is an expulsion or long-term suspension, the student or parents may have the right of appeal to a body outside of the school district. This determination is normally dictated by state law. Some states afford an appeals route to the state education agency. Other states allow appeal directly to the state or federal court system. If a particular state allows appeal beyond the school board level, the student and parents should be informed of this right in the letter notifying the student of the expulsion or long-term suspension.

Recommendations for Practice

Courts have recognized the rights of students to be informed of prohibited behavior and afforded certain procedural safeguards prior to the imposition of punishment. In discipline cases, several rules should be followed:

- The administrator should move forward with an investigation by gathering additional information on any disciplinary infractions reported. Administrators should make further inquiry of other witnesses to ascertain the facts concerning the event.
- The administrator must determine the nature of the punishment, as the necessary steps will be modified with increasing severity of punishment. The scenario changes significantly for long-term suspensions of eleven days or more and expulsions. More thorough due process is required before imposing these punishments.
- A letter should be sent to the student's parents, outlining the charges against the student and informing them of the student's rights under the appropriate school policies and law for more severe punishments.
- If the administrator acting as a hearing officer becomes actively involved in the investigation, he/she should request that the school district superintendent appoint another administrator to hear the matter.
- Principals should become fully familiar with applicable state laws and regulations and district policies impacting their schools.

References

[1] Ingraham v. Wright, 430 U.S. 651 (1977)
[2] *Id.*
[3] *Id.*
[4] Goss v. Lopez, 419 U.S. 565 (1975).

5

Child Abuse

James B. Gessford, Joan L. Curcio,
and Timothy W. Curtis

Introduction

The jury foreman announced the verdict against the school district and two of three school officials: "$80,000 in compensatory damages and $395,000 in punitive damages." The underlying case, *Larson v. Miller*[1] involved a suit by parents on behalf of their daughter, a special education student who was sexually abused by a school van driver. This federal court suit was filed against the superintendent, the director of special education, the transportation director and the school district alleging various federal and state law claims. The claims included alleged violations of constitutional rights under Section 1983 and Section 1985 (conspiracy) by failing to receive, investigate and act upon a prior complaint of abuse by the employee, and by failing to adequately train employees in the prevention and reporting of the abuse of disabled children. Fortunately for the school district and the three school officials against whom the case was filed, when the matter was finally concluded in 1996, the verdict had been reversed and all school defendants were exonerated. The Eighth Circuit stated "[t]he jury's verdict in this case appears to have been the product of pure speculation and understandable sympathy for a little girl who was undisputably harmed."[2] The school van driver was ultimately convicted of sexual abuse and sentenced to jail.[3]

In today's litigious society, these types of cases are no longer atypical, and many educators may find themselves in a similar circumstance, i.e., listening with anticipation as the verdict is read. With the arrival of the new millennium, it can be said with certainty that the school scene is now different and far more complex when it comes to child abuse issues. Against this backdrop, educators must become enlightened about the child abuse problem in America, and gain a thorough understanding of the practical, educational and legal sides of the issue.

Legal Issues

Child abuse and neglect issues have existed for decades and schools to a degree have always been involved with addressing the problem.[4] Despite the time and money spent addressing abuse, it is not declining, and schools are involved more than ever before. In 1990, for example, the United States Advisory Board on Child Abuse and Neglect delivered a report to the Secretary of Health and Human Service, describing a "national child protection emergency" and recommended numerous improvements in prevention, identification, and treatment.[5] In 1993, more than one and half million children were reported as victims.[6] According to a 1995 federal government report, approximately two thousand children die every year in the United States due to abuse and neglect.[7] It is notable that numerous web-sites have been posted on the Internet which deal with all aspects of the issue. Another indicator that the problem is getting worse is the number of case filings involving some form of abuse or neglect against schools and school personnel. Tragically, children are not only at risk of abuse at home or on the streets, but sometimes at school as well; by teachers, coaches, and other personnel. Principals can help protect their students, themselves, and their schools only if they are vigilant and knowledgeable about the child abuse topic.[8]

Defining Child Abuse

To have any sort of meaningful understanding or discussion about the problem of child abuse, it is critical to adopt definitions for the term. "Child abuse" and "neglect" are, unfortunately, common terms. They are also terms that mean vastly different things to different people. "The definition of child abuse can range from a narrow focus, limited to intentional inflicted injury, to a broad scope, covering any act that adversely affects the developmental potential of a child."[9] The term "child maltreatment" is sometimes used instead, but that term does little to clarify exactly what is meant. One problem in defining child abuse and neglect is the terms' meanings are constantly changing, as society's attitudes toward the care and discipline of children change. "As recently as two decades ago, administering a strap to ensure obedience was not uncommon. Yet today, [one] would probably call beating a child with a strap abusive."[10] Thus, any definition of child abuse and neglect must be fluid enough to allow for changes in societal norms. Another problem with a meaningful discussion is that definitions vary widely on the state and local level. In addition, recent legal concepts such as "corporal punishment" and all forms of "sexual harassment" have blurred distinctions and led to further definition confusion.

Towers' definitions have become commonly accepted for use in the field, and fittingly, focus on the abused and neglected child: "An abused or neglected child is a child whose physical or mental health or welfare is harmed or threatened with harm by the acts and omissions of his/her parent or other person responsible for his/her welfare."[11] Child maltreatment is often broken down into four distinct types of maltreatment: 1) physical abuse—nonaccidental physical injuries caused by the child's caretaker; 2) neglect—inattention to the basic needs of a child, such as food, clothing, shelter, medical care, and supervision; 3) emotional maltreatment— blaming, belittling or rejecting a child or constantly treating siblings unequally, and a persistent lack of concern by the caretaker for the child's welfare; and 4) sexual abuse—any contacts or interactions between a child and an adult caretaker in which the child is being used for the sexual stimulation of the perpetrator or another person.[12] Understanding the practical definitions of each type of child maltreatment, recognizing their signs, and knowing the specific legal definitions in the state or locality are essential steps for all who work in a school environment, including principals.

Mandatory Reporting

All states require certain classes of individuals to report their suspicions or knowledge of child abuse or neglect to proper authorities. "Some statutes specifically name educators as mandated reporters; others do not specify by job title but are more inclusive, indicating that any citizen must report."[13] Connecticut's mandatory reporting statute is a good example of the typical mandatory reporting statute. Connecticut law requires the reporting of suspected child abuse by individuals in various professions, including school teachers, school principals, school guidance counselors, and school paraprofessionals.[14] While every state has a mandatory reporting statute of some sort, there is great variety from state to state.

Generally, mandatory reporters must give a report to some designated investigatory agency when they have a reason to believe or suspect that a child has been abused or neglected in some way. This simple statement, however, raises several questions, such as: What individuals are mandated reporters? What evidence of abuse or neglect necessitates a report? To whom should they report? How soon must they report? Must the report be written or oral? The answers to these questions are not always simple; the answers often depend upon where one lives. Since failure to comply with some mandatory reporting statutes can result in criminal charges, however, the answers to these questions are critical.[15]

Educators are, in general, required to report child abuse. Therefore, it is important that all educators, including school principals, familiarize themselves with the reporting statute in their own state. As noted above, failing to report suspected child abuse can sometimes result in criminal penalties. On the other hand, many states provide immunity from either civil or criminal liability, or from both, if an individual mandated to report does so in good faith.[16] In some states, if a mandated reporter reports the suspected abuse to a superior (for example a teacher telling the school principal of suspected abuse), the superior then has the duty to report the abuse to the proper authorities.[17] In other states, both the subordinate and the superior would then have a duty to report to the authorities.[18] States differ as well on whether an oral or written report is required, with some states requiring that an oral report be made soon after the mandatory reporter suspects abuse or neglect and followed by a written report. Some states require that reporters make their reports to different authorities or make multiple reports, depending upon the nature of the maltreatment. Maryland, for example, requires that reporters file a written copy of the report with the State's Attorney when abuse (as opposed to neglect) is suspected, and Maine requires reporters to give reports to the district attorney if the suspected abuser is a person other than the child's caretaker.[19]

It is important to note that this duty to report arises in most states when there is "reasonable cause to suspect" or "reasonable grounds to believe" that a child has been abused.[20] If a mandatory reporter actually witnesses abuse, he or she is probably obligated to report; on the other hand, the duty to report probably does not arise if the reporter's only evidence of abuse is a scraped knee. In between, however, is a lot of grey area.

Many may be frustrated at the lack of guidance the individual statutes give with regard to when to report suspected abuse. But note, "[w]hile States require the reporting of suspected abuse, no State requires that the reporter have proof that the abuse or neglect occurred" before making such a report.[21] Also, there may be civil immunity for failure to report cases which fall in the grey area. In *Larson v. Miller*, the court held that the decision of whether to report could not be the basis of liability under the Political Subdivisions Tort Claims Act, stating:

> The Nebraska child abuse reporting law requires any person to report suspected child abuse if that person has

> 'reasonable cause to believe a child has been subjected to abuse.' Whether or not 'reasonable cause' exists within the meaning to the statute requires an exercise of discretion and personal judgment....[22]

Waiting too long to report, however, can be dangerous to the child (allowing him or her to be subject to further maltreatment) and to the reporter (excessive delay can lead to criminal and/or civil liability as well as professional licensing issues). Since most states provide some sort of immunity from liability for reports made in good faith, excessive concern as to whether one is reporting child abuse without enough evidence may be unwarranted. The best strategy is to become familiar with your state's mandatory reporting statute.

Recognizing Abuse

The most critical issue for mandatory reporters is to recognize the signs of child maltreatment. Mandatory reporting statutes will do little to mitigate the problem of abuse if mandatory reporters cannot recognize when a child is being abused or neglected. Unfortunately, there is no sure-fire formula one can apply to determine that a child is being abused or neglected. "[R]ecognition of child maltreatment is not based upon the detection of one or two clues, but rather on the recognition of a cluster of indicators that make up a composite."[23] Listed below are some of the more common signs of child maltreatment, categorized by the type of maltreatment. Possible indicators of physical abuse are:[24]

- Numerous bruises at various stages of healing
- Marked change in behavior (too aggressive and destructive, or withdrawn)
- Presence at school longer than necessary (arriving early/leaving late)
- Frequent absences
- Attempted suicide or suicidal gestures
- Inappropriate clothing (e.g., long sleeves in warm weather to hide bruises)
- Poor peer relationships
- Extreme dependence on others
- Drug and/or alcohol abuse
- Promiscuity
- Frequent complaints that parent(s) is/are angry
- Child says that parent injured him/her

Possible indicators of neglect are:[25]

- Poor hygiene
- Inappropriate clothing (e.g., no coat in cold weather)

- Truancy
- Disorganized thinking
- Listless behavior
- Stealing or hoarding of food

Possible indicators of emotional maltreatment are:[26]

- Speech disorder
- Behavior extremes
- Overly adaptive, compliant behavior
- Attempted suicide or suicidal gestures
- Preoccupation with being perfect/pleasing others
- Hyperactivity
- Developmental lags

Possible indicators of sexual abuse are:[27]

- Unwillingness to participate in physical activities (such as gym class)
- Obsession with cleanliness
- Intense promiscuity
- Frequent self-stimulation (especially in younger children)
- Precocious sexual behavior (especially in younger children)
- Difficulty walking or sitting
- Self-mutilation
- Pregnancy in early adolescence
- Child says he/she had been sexually assaulted

Corporal Punishment

The United States has a long history of allowing the use of corporal punishment as a means of maintaining discipline at school.[28] "At common law a single principle has governed the use of corporal punishment since before the American Revolution: teachers may impose reasonable but not excessive force to discipline a child."[29] In some circles of thought, any form of corporal punishment is viewed as child abuse. This is particularly true when viewed in hind sight as excessive. School personnel must be extremely careful in this abuse related area.

In the landmark case of *Ingraham v. Wright,*[30] the United States Supreme Court held that the Eighth Amendment (which prohibits cruel and unusual punishment) does not prohibit teachers from physically punishing students.[31] The Court also held that neither does the Fourteenth Amendment right to procedural due process prohibit such punishment. The Court wrote, "[W]e find that corporal punishment in public schools implicates a constitutionally protected liberty interest, but we hold that the traditional common-law remedies are fully adequate to afford due process."[32] However, while the

United States Constitution does not prohibit reasonable corporal punishment, several states do so by statute. As with most issues raised by the problem of child abuse as it relates to the school setting, corporal punishment is addressed on a state or local level. Numerous states have outright bans on the use of corporal punishment as a means of ensuring discipline in schools.[33] Even in states where corporal punishment is specifically allowed; counties, school districts, or municipalities may have adopted rules or policies prohibiting such punishment.

Some states provide criminal sanctions for violations of the prohibition against corporal punishment. For example, if a teacher uses corporal punishment on a child in Montana, he or she may be guilty of a misdemeanor, and fined up to $500.[34] Although some states provide civil and criminal immunity to a teacher who inflicts corporal punishment,[35] many do not. School personnel who physically punish their students may be opening themselves up to criminal and civil legal action and professional license revocation. Even those living and working in states that grant civil and criminal immunity for the infliction of corporal punishment are not fully protected.

While the Supreme Court in *Ingraham* held that corporal punishment is not prohibited by the Eighth Amendment and does not violate the Fourteenth Amendment guarantee of procedural due process, the Court did not address whether corporal punishment violated the Fourteenth Amendment guarantee of substantive due process. This issue was raised, however, by a lower court in *Hall v. Tawney*.[36] In *Hall*, a student who had been corporally punished argued that a violation of substantive due process occurs "at the point where a specific punishment exceeds in severity" that which could be reasonably required under the circumstances.[37] While not agreeing completely, the court did state:

> [T]he substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.[38]

In *Wise v. Pea Ridge School District*[39] the Eighth Circuit reached a similar conclusion. In that case, the court outlined four factors that need to be considered in determining whether specific instances of corporal punishment violate a student's substantive due process rights: 1) the need for the application of corporal punishment; 2) the relationship between the need and the amount of punishment administered; 3) the extent of injury inflicted; and 4) a determination of whether the punishment was administered in a good faith effort to maintain discipline or maliciously and sadistically for the very purpose of causing harm.[40] Under either the *Hall* standard, or the *Wise* four-factor test, an educator may incur civil liability despite the presence of a state statute granting immunity for administering corporal punishment. In certain instances, the use of corporal punishment may also violate a student's right to be free from unreasonable seizures as guaranteed by the Fourth Amendment. The Tenth Circuit examined this issue in *Edwards v. Rees*.[41] In *Edwards*, a school official removed a student from class to question the student about a bomb threat. The court determined that the official's seizure of the student was constitutional, because it was "justified at its inception and reasonably related in scope to the circumstances which justified the [seizure] in the first place."[42] Other courts have applied the same standards in determining the constitutionality of specific instances of seizing a student.[43] While this standard is fairly lenient, an educator still may incur civil liability in seizing a student if such a seizure is "unreasonable under the circumstances then existing and apparent."[44] It should be obvious that the entire abuse related area of corporal punishment is full of mine-fields and traps for the unwary.

Sexual Abuse

Perhaps the most disturbing instances of child maltreatment that occur in schools are those that involve sexual abuse. Unlike physical abuse, which may occur simply through overzealous use of corporal punishment; sexual abuse in schools does not occur inadvertently. Often the abuser has a history of abusing students. Several courts have found school officials civilly liable for sexual abuse perpetrated by their employees when those officials knew, or should have known, of the abuse but did little or nothing to prevent the abuse.

In addition to incurring liability under various state causes of action, such as negligent hiring or negligent retention,[45] school officials may be liable under federal law when a teacher abuses a student. In *Doe v. Taylor Independent School District*,[46] a student sued her school principal for violation of a federal civil rights statute, Section 1983. The Fifth Circuit held that "school children have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment" and that "physical sexual abuse by a school employee violates that right."[47] The court further held that a school official is personally liable for "a subordinate's violation of a...student's constitutional right to bodily integrity in sexual abuse cases," if:

> 1) the [official] learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing toward the conclusion that the subordinate was sexually abusing the student; and 2) the [official] demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and 3) such failure caused a constitutional injury to the student.[48]

Thus, the court stated that a jury could find the principal liable for violation of the civil rights statute for allegedly ignoring complaints from students, parents, and even other teachers, regarding a pattern of inappropriate behavior toward students by one of the school's teachers.[49] In *Larson v. Miller*, the court noted that one prior complaint against the school van driver, which allegedly involved him asking the student whether she had been breast fed and whether she was wearing silk panties, was not sufficient evidence of "a pattern of unconstitutional behavior" by the employee.[50]

Another federal statute that is pertinent to this subject is Title IX.[51] Although this statute does not impose personal liability, the Supreme Court held in *Gebser v. Lago Vista Independent School District*[52] that school districts may incur civil liability for teacher-student sexual harassment under Title IX. The Court noted that school districts may be liable "for the sexual harassment of a student by one of the district's teachers" if "an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to the teacher's misconduct." Although *Gebser* refers to liability for sexual harassment, the act constituting harassment was an ongoing sexual relationship between a student and a teacher. Such a relationship clearly falls within the definition of sexual abuse. Thus, even though a different term is used, Title IX can simply be a vehicle through which students recover a monetary award for damages caused by sexual abuse.

Although peer-to-peer sexual harassment is not strictly sexual abuse as defined above, a Supreme Court case dealing with this issue warrants mention here, since the case also dealt with the application of Title IX. In *Davis v. Monroe County Board of Education*[53] the Court held that a school board may be liable for student-to-student sexual harassment under Title IX when it "acts with deliberate indifference to known acts of harassment in its programs or activities," but "only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[54] The alleged victim in *Davis* was a fifth-grader who alleged that one of her classmates sexually harassed her over a period of five months, and the school failed to put a stop to the harassment.[55]

The Supreme Court has remarked that "[t]he number of reported cases involving sexual harassment of students in schools confirms that harassment unfortunately is an all too common aspect of the educational experience."[56] Such treatment can greatly harm a student whether the student is being harassed by another student, or sexually abused by a teacher, coach, or counselor. In addition, individuals, school boards and districts can incur substantial liability for failing to protect students against such maltreatment. As with all types of maltreatment, school officials need to be able to recognize the signs of sexual abuse and respond appropriately to allegations or suspicions of such abuse to protect their students and themselves.

Recommendations for Practice

Case law on child abuse involving schools and educators has grown ever since the 1990 report that described a national child protection emergency. When these cases are related to an administrator's failure to investigate an abuse complaint within the school, it often has to do with a decision to delay or ignore the necessary action out of concern for confidentially or loyalty to an employee. However, it is clear that school officials have responsibilities and liabilities for these issues and should be the first line of defense against abuse and neglect.[57] There are many specific procedures and useful behaviors that contribute to a safe environment for children, with side benefits of less litigation and expense.

- Know the cluster of indicators of abuse and train others who have a duty to report suspected abuse. Indicators that occur repeatedly and/or in combination with each other should be red flags to the educator.
- Maintain a clear policy on the principal's role and the teacher's role in reporting. Teachers, especially beginning teachers, say they are not always certain about the expectations of the principal regarding procedures. They need to know where and whom to call or submit written reports if they are required.
- Collaborate with local child protective services; use them to train staff and to work with the school in the interest of high-risk children.

- Have a clear policy on how to proceed when an abuse investigator comes to school.
- Regularly inform parents of the school's policy regarding child abuse and the procedures followed by the school in the event of potential child abuse allegations.
- Provide training for parents so that they too can recognize the signs of abuse and know where to go or whom to contact for assistance.
- Use legal screening methods to keep abusers out of the schools through the hiring process; be vigilant in checking employment references.
- Publish a handbook for staff use and be aware of any customary practices in the school which smack of callous indifference toward the safety of children; they may give the appearance of being the official policy of the school district.
- If corporal punishment is allowed within the state and school district, follow policy scrupulously in administering it; establish clear rules and expectation for the staff regarding it; and train faculty in more effective alternatives for disciplining students.[58]
- Practice prevention by educating children in problem-solving and in how to deal with crises on self-protection.[59]
- Consistently develop and revise school policy by addressing three broad areas of concern: the role the school should play in identification and intervention when the abuse has occurred at home; the role the school should play in assuring a child's safety from abuse within school confines; and the role the school should play in developing and providing prevention programs against abuse and neglect.[60]

References

[1] Larson v. Miller, 76 F.3d 1446 (8th Cir. 1996).
[2] *Id.* at 1456.
[3] *Id.* at 1452.
[4] C. C. TOWER, THE ROLE OF EDUCATORS IN THE PROTECTION AND TREATMENT OF CHILD ABUSE AND NEGLECT (1992).
[5] EDUCATION WEEK, August 1, 1990, at 7.
[6] Federal Interagency Forum on Child and Family Statistics, AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING (1997), *citing* National Center on Child Abuse and Neglect, THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-3).

[7] U.S. Advisory Board on Child Abuse and Neglect, A NATION'S SHAME: FATAL CHILD ABUSE AND NEGLECT IN THE UNITED STATES, (1995), p. 1.

[8] Although these web-sites were active when this chapter was written, the nature of the Internet is such that some of these links may no longer be active.

- American Association of School Administrators (http://www.aasa.org/)
- Connect For Kids (http://www.connectforkids.com/)
- Child Abuse Prevention Network (http://child.cornell.edu/)
- Mark McGwire Foundation For Children (http://mcgwire.kids.yahoo.com/)
- National Clearinghouse On Child Abuse and Neglect Information (http://www.calib.com/nccanch/)
- PANdora' Box-The Secrecy of Child Sexual Abuse (http://www.prevent-abuse-now.com/)
- Safeguarding Our Children- United Mothers (http://www.soc-um.org/)
- Sexual Abuse Resources For Educators (http://www.smith-lawfirm.com/teachers.htm)
- U.S. Dept. of Health and Human Services Children's Bureau (http://www.acf.dhhs.gov/programs/cb/)

[9] J. A. MONTELEONE and A. E. BRODEUR, *Identifying Physical Abuse,* in RECOGNITION OF CHILD ABUSE FOR THE MANDATED REPORTER (1994).

[10] TOWER, *supra* note 4 at 3.

[11] TOWER, *supra* note 4 at 4.

[12] TOWER, *supra* note 4 at 15-21.

[13] TOWER, *supra* note 4 at 32.

[14] Conn. Gen. Stat. § 17a-101 (1997).

[15] States which provide criminal penalties for failure to comply with mandatory reporting statutes include, but are not limited to: Alabama—Code of Ala. § 26-14-3 (1999); Georgia—O.C.G.A. § 19-7-5 (1998); Idaho—Idaho Code § 16-1619 (1998); Illinois—ILCS 5/4 (1999); Kansas—K.S.A. § 38-1522 (1997); and New Mexico—N.M. Stat. Ann. § 32A-4-3 (1998). (This is not purported to be a complete list of states providing criminal penalties for failure to report child abuse).

[16] *See, e.g.,* Arizona—A.R.S. § 13-3620 (1998); California—Cal. Pen. Code § 11172 (1999); Georgia—O.C.G.A. § 19-7-5 (1998); Minnesota—Minn. Stat. § 626.556 (1998); Mississippi—Miss. Code Ann. § 93-21-23 (1998); Ohio—ORC Ann. § 2151.421 (1998); Washington—Rev. Code Wash. (ARCW) § 26.44.060 (1999);

and Wyoming—Wyo. Stat. § 14-3-205 (1999). (This is not a complete list).

[17] *See, e.g.*, Massachusetts—Mass. Ann. Laws ch. 119, § 51A (1999).

[18] *See, e.g.*, Kentucky—KRS § 6200.030 (1998).

[19] Md. FAMILY LAW Code Ann. § 5-704 (1998); 22 M.R.S. § 4011 (1998).

[20] *See, e.g*, Alaska—Alaska Stat. § 47.17.020 (1999); Arizona—A.R.S. § 3620 (1998); Arkansas—Ark. Stat. Ann. § 12-12-507 (1997); Florida—Fla. Stat. § 39.201 (1998); Georgia—O.C.G.A. § 19-7-5 (1998); Illinois—325 ILCS 5/4 (1999); Maine—22 M.R.S. § 4011 (1998); Washington—Rev. Code Wash. (ARCW) § 26.44.030 (1999); and Washington, D.C.—D.C. Code § 2-1352 (1998).

[21] TOWER, *supra* note 4 at 33.

[22] Larson v. Miller, 76 F.3d 1446, 1457 (8th Cir. 1996) (the court also held that decisions to "investigate, hire, fire, and retain" employees are generally discretionary and cannot be the basis for liability on the part of school districts).

[23] TOWER, *supra* note 4 at 15.

[24] TOWER, *supra* note 4 at 15-19; *see also* L. J. VELTKAMP and T. W. MILLER, CLINICAL HANDBOOK OF CHILD ABUSE AND NEGLECT (1994), pp. 13-16.

[25] TOWER, *supra* note 4 at 20.

[26] TOWER, *supra* note 4 at 20-21. (Note, however, the parents of an emotionally disturbed child generally accept the existence of a problem. They are concerned about the child's welfare and are actually seeking help. The parents of an emotionally maltreated child often blame the child for the problem (or ignore its existence), refuse all offers of help, and are unconcerned about the child's welfare).

[27] TOWER, *supra* note 4 at 21-22.

[28] C.P. WEISS, *Curbing Violence or Teaching It: Criminal Immunity for Teachers Who Inflict Corporal Punishment*, 74 WASH. UNIV. L. QUARTERLY 1251, 1253-54 (1996).

[29] Ingraham v. Wright, 97 S. Ct. 1401, 1407 (1977).

[30] *Id.*

[31] *Id.* at 1409

[32] *Id.*

[33] *See, e.g.,* California—Cal. Ed.Code § 49001 (1999); Connecticut—C.G.S.A. § 53a-18 (1999); Hawaii—HRS § 302A-1141 (1999); Iowa—Iowa Code § 280.21 (1997); Maryland—Ms. Education Code Ann. § 7-306 (1998); Massachusetts—Mass. Ann. Laws ch. 71, § 37G (1999); Michigan—M.C.L.A. § 380.1312 (1997); Minnesota—M.S.A. § 121A.58 (1999); Montana—Mont. Code

Anno. § 20-4-302 (1998); Nebraska—R.R.S. Neb. § 79-295 (1999); Wisconsin—Wis. Stat. § 118.31 (1998).

[34] Mont. Code Anno. § 20-4-302 (1998).

[35] Weiss, *supra* note 28 at 1251.

[36] Hall v. Tawney, 621 F.2d 607 (1980).

[37] *Id.* at 613.

[38] *Id.*

[39] Weiss v. Pea Ridge Sch. Dist., 855 F.2d 560 (8th Cir. 1988).

[40] *Id.* at 564.

[41] Edwards v. Rees, 883 F.2d 882 (10th Cir. 1989).

[42] *Id.* at 884.

[43] *See* Hassan v. Lubbock Indep. Sch. Dist., 55 F.3d 1075 (5th Cir. 1995), and Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010 (7th Cir. 1995).

[44] *Wallace*, 68 F.3d 1010 at 1014 (7th Cir. 1995).

[45] *See, e.g.*, Marquay v Eno, 662 A.2d 272 (N.H. 1995).

[46] Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443 (5th Cir. 1994).

[47] *Id.* at 451-452.

[48] *Id.* at 454.

[49] *Id* at 457.

[50] *Larson*, 76 F.3d 1446, 1453 (8th Cir. 1996).

[51] 20 U.S.C. § 1681, *et seq.*

[52] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

[53] Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999)

[54] *Id.* At 633

[55] *Id.* At 633-634.

[56] *Gebser*, 524 U.S. 274, at 292.

[57] W. B. Crenshaw, L. M. Crenshaw, and J.W. Lichtenberg, *When Educators Confront Child Abuse: An Analysis of the Decision to Report*, Child Abuse & Neglect, (vol. 19, no. 9), 1095.

[58] http://childlaw.law.sc.edu/usermanual/educator/section6.htm, visited July 1999.

[59] *Id.*

[60] A.W. McEvoy, *Child Abuse Law and School Policy*, Education and Urban Society, (vol. 22, no. 3), 251.

6

Student-to-Student Sexual Harassment

Kathleen A. Sullivan and Perry A. Zirkel

Introduction

Over the last several years, society has witnessed a growing concern with sexual harassment, initially in the workplace and now increasingly in the public schools. Statistics show that this school concern is not without justification. The most frequently cited source to date, the American Association of University Women's study, found 85 percent of girls and 76 percent of boys in public schools say they have been harassed.[1] Almost 80 percent of these students reported other students as their harassers.[2]

If the behavior occurred in a public school between teachers rather than students, the teacher-victim would possess a clear legal right to pursue a remedy in court.[3] Until recently, the right of a student to pursue a judicial remedy for harassment by another student depended on where they lived.[4] Thus, school administrators and students alike had to look for guidance to the variety of decisions offered by lower courts.[5] In 1999, the Supreme Court issued a decision in *Davis v. Monroe County Board of Education* that defined the rights of students when confronted with student to student sexual harassment.[6] As a result of the Supreme Court decision, school administrators now bear a clear burden to act appropriately to curtail known student-to-student sexual harassment.

Legal Issues

In the employment context, the judiciary has interpreted the prohibition of discrimination on the basis of sex in Title VII[7] to encompass sexual harassment.[8] The Equal Employment Opportunity Commission, which is charged with enforcing Title VII, has issued guidelines that lend further definition to sexual harassment in the area of employment. The guidelines provide explicit employer liability for a claim based on supervisors' actions regardless of whether the employer knew of their occurrence.[9] In contrast, employers only face liability for a claim based on sexually harassing conduct between co-equal[10] employees if the employer knew or should have known of the conduct and failed to take prompt, appropriate action.[11] Although the law on sexual harassment in the workplace is still evolving, employees operate in a relatively clearly defined arena.

Students who suffer sexual harassment by other students historically have not enjoyed the same clear legal remedy. Since only individuals in an employment relationship are protected by Title VII, students were forced to find alternate grounds for their sexual harassment suits. Specifically, to hold school districts liable for peer sexual harassment, students have sued under Title IX,[12] Section 1983,[13] and various state laws. Now, with the Supreme Court's decision in *Davis*, students enjoy some clarity in their pursuit of a legal remedy.

Title IX

Most student-to-student sexual harassment suits have been based on Title IX, premised on the analogy between its prohibition of sex discrimination available to employees under Title VII—a strategy that the Supreme Court condoned in *Davis*. Title IX bars sex discrimination in education programs or activities receiving federal funds, and reads in part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."[14] Congress clarified Title IX's reach in the *Civil Rights Restoration Act of 1987* when it defined "program or activity" to mean that the prohibition against discrimination applies to the entire institution if any part receives federal funds.[15] Accordingly, Title IX applies to virtually every public school system in the United States.

In advance of the 1999 *Davis* decision, the Supreme Court issued several rulings that formed the building blocks for the establishment of Title IX liability. First, in 1979, the Court ruled that individuals can bring private suits against school districts based on Title IX violations[16] and subsequently ruled that students may recover damages under Title IX.[17] More recently, the Court issued a decision in *Gebser v. Lago Vista Independent School District*,[18] a teacher-to-student sexual harassment case. Although *Lago Vista* encompassed only harassment occurring between a school district employee and a student, the decision provided a preview of the Court's approach in balancing the interests in protecting school districts' fiscal integrity and protecting students' interest in a safe, educational environment.

Moreover, in *Lago Vista* the Court established a two pronged standard for considering school district liability in teacher-to-student sexual harassment cases. Again, accurately predicting the Supreme Court's future action in the context of student-to-student sexual harassment, lower courts and school districts drew lessons from *Lago Vista* and imported similarly two-pronged standards to consider student-to-student harassment. These standards may be easiest to conceptualize as having a knowledge and a response component, although the two often work in tandem and cannot be entirely isolated. The first component, knowledge, refers to the level of awareness a school must have before the court will hold it responsible for the alleged harassment under Title IX. The second component, response, refers to what Title IX requires a school to do once it possesses the requisite level of knowledge.

Knowledge, or notice, standards can be divided into two levels: actual and constructive. The actual knowledge standard provides more latitude for schools than does the constructive knowledge standard. Courts that applied the actual knowledge standard required that, at a minimum, a school actually knew of the harassment before liability attached. Alternatively, those courts that applied the lower, constructive standard required at a minimum, that a school had reason to know of the harassment. Of the fifteen district and circuit courts that recognized the right of a student to sue school districts under Title IX for peer sexual harassment before *Davis*, ten applied the stricter, actual knowledge standard.[19] On the other hand, five district courts used the constructive knowledge standard.[20]

Confirming the majority view and mirroring its decision in *Lago Vista*, the Supreme Court chose the actual knowledge standard in *Davis*.[21] Extending its earlier *Lago Vista* analysis, although the Court in *Davis* did not articulate specifically when a school district possesses actual knowledge for purposes of student-to-student sexual harassment liability, the case law supports the conclusion that a school district only possesses actual knowledge when an official with the authority to institute corrective measures learns of the harassment.[22] The second, overlapping component, the response schools must take to avoid liability, encompassed a wider range of standards leading to the Supreme Court's reconciliation of this dispute in *Davis*. More specifically, the response standards can be generally divided into three categories that are successively less favorable to schools: intentional discrimination, deliberate indifference, and negligence. Under the standard most generous to school districts, intentional discrimination, one lower court required that the school district "responded differently to sexual harassment claims based on sex."[23] Further, in its sharply criticized opinion,[24] the Fifth Circuit stated that, "a school district might violate Title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward the sexual harassment of girls while addressing assaults that harmed boys."[25]

Other lower courts preserved the intentional discrimination requirement, but moderated the Fifth Circuit's approach. For example, in *Wright v. Mason City Community School District*,[26] a federal district court in Iowa held that school districts faced liability for a response that showed they "intentionally failed to take proper remedial measures because of the [student's] sex." Similarly, another federal trial court held that a school district is liable when it "...intended to create a hostile educational environment for the [student]."[27] In any event, even when the student possesses no direct evidence of the school's intent to discriminate, lower courts held that intent can be inferred "through a school district's active encouragement of peer harassment, actual knowledge of and failure to take steps to remedy such harassment, or tolerance of harassing behavior."[28] Although interpreted variously, intentional discrimination constituted the most stringent response standard that courts required students to meet in order to bring a successful claim against a school district. Only one court adopted the less demanding, intermediate standard of deliberate indifference in the context of a Title IX claim. In *Alton v. Board of Educ. of Boyne City Public Schools*, a federal district court in Michigan held that a school district was liable when "its response exhibited such indifference as to indicate an attitude or permissiveness that amounts to discrimination."[29] Accordingly, the court found that a school district might avoid liability by making a good faith, remedial action.

Negligence, the final category of response standards, placed the heaviest burden on the schools. Under a negligence analysis, seven cases held that schools face liability when they failed to act entirely or failed to act reasonably.[30] Even this standard offered some protection to schools from liability. The court in *Doe v. Oyster River Cooperative School District*, explained:

> If the school selects an adequate course of action, even if it does not involve punishment, an aggrieved student cannot object to the selected action. The school need not follow the course preferred by the student or the student's parents. All that is required is that the school take steps "reasonably likely" to end the harassment. More-

> over, even if the sexual harassment continues, the school could possibly be exonerated if it took reasonable steps to stop the harassment every time it became aware of it.[31]

Applying the standard, the *Oyster River* court held that the school had failed to take the most basic step of notifying the teachers of the classes that the student-target and student-harasser shared. Also applying a negligence standard, another court stated, "an educational institution [that] fails to take steps to remedy peer-on-peer sexual harassment...should be held liable to the harassed student for that discriminatory conduct."[32] Importantly, the same court held that a school could be found negligent, therefore liable, if it provided "no reasonable avenue for complaint."[33] Thus, even under a negligence standard, districts were able to protect themselves from liability by developing sound policy and procedures and taking reasonable action in response to students' complaints of sexual harassment.

Again following the analysis it established in *Lago Vista*, in *Davis*, the Supreme Court resolved the disparate lower court decisions and chose the standard of deliberate indifference. In *Lago Vista*, the Court defined deliberate indifference as "an official decision by the [school] not to remedy the violation."[34] In *Davis*, the Supreme Court explained that deliberate indifference in the student-to-student sexual harassment context exists "only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."[35] Responding to a biting dissent, the Supreme Court majority makes clear that its "clearly unreasonable" standard does not require school districts to eradicate peer harassment or guarantee that students follow a uniform set of rules, but rather that the standard requires school districts to identify appropriate disciplinary measures designed to curtail the harassment.[36] Thus, while school districts may not remain idle in the face of student-to-student sexual harassment, the Supreme Court again recognized that school officials must retain discretion in determining appropriate action. Moreover, the *Davis* Court specified that a private claim for money damages by a student will only arise when a school district is "deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[37]

An issue not addressed by the Supreme Court is the liability of individuals under Title IX. Of the lower courts that have considered such a case, only one court has specifically interpreted Title IX to directly permit suits against individual school personnel.[38] Conversely, the vast majority of courts deciding the issue of individual liability under Title IX have not permitted such suits.[39] The courts' different results hinge on their interpretation of the language that prohibits discrimination "under any education program or activity."[40] The lone court reasoned that this language demands only that a defendant must exercise a sufficient level of control over the program, while the vast majority determined the plain language excludes school district employees.

Additional guidance and remedies are available through the Office for Civil Rights (OCR), the agency responsible for enforcing Title IX. OCR may investigate complaints and, via particular procedures, terminate federal funding to those school districts it finds in violation of Title IX. OCR issued its original "guidance" in March 1997 setting forth its interpretation of potential liabilities under Title IX.[41] In January 2001, OCR issued revised guidance in light of the Supreme Court's recent decisions.[42] Like its earlier guidance, OCR generally suggests a higher standard than that outlined by the Supreme Court. However, OCR's guidelines are only entitled to deference by the courts and are not binding legal requirements.[43]

Section 1983

Section 1983 of the Civil Rights Act of 1871 (Section 1983)[44] provides an alternate avenue to pursue sexual harassment claims in court. Section 1983 premises liability on violations of federal constitutional or statutory rights.[45] Constitutional claims of violations of the Due Process and Equal Protection Clauses constitute the most frequently raised Section 1983 cases in student-to-student sexual harassment cases.[46]

Most courts refuse to allow students to use Section 1983 to allege due process violations against school districts based on student-to-student sexual harassment.[47] The foundational element of students' due process arguments is that the school unlawfully deprived them of their right to bodily integrity as protected by the Fourteenth Amendment.[48] These courts reason that compulsory attendance laws do not establish the special relationship necessary to create an affirmative duty for the school to protect students. Further, no such duty exists under the law in the absence of an affirmative action by the school to restrain an individual from acting on his/her own behalf. On the other hand, one court implied *in dicta*, which are nonbinding remarks not necessary to the decision in the case, that a school's inappropriate or unreasonable attempt to curtail the harassment that results in increased harassment might give rise to a due process violation.[49] Thus, on balance, the vast majority of courts continue to reject sexual harassment claims based on the Due Process Clause.

The only Section 1983 argument against school districts that the courts have accorded any notable confirmation is based on the Equal Protection Clause of the Fourteenth Amendment. A pair of federal appellate courts allowed students to go forward with claims contending that the schools singled them out for unequal treatment based on their membership in an identifiable group.[50] To succeed in court under a theory of Fourteenth Amendment sex discrimination, the students must show that the school intentionally treated them differently based on their gender. Departures from a school's established practices can serve as evidence of this necessary discriminatory intent.[51] For example, proof that the school district enforced sexual harassment policies only when the targets were either male or female and failed to protect targets of the opposite sex would be sufficient to hold a school liable under equal protection.[52]

Although the courts have allowed a limited scope for liability of school under Section 1983, they have permitted more latitude for students to use Section 1983 to sue individual school officials in their personal capacity for violations of federal rights in connection with sexual harassment. First, two courts recognized a Section 1983 claim seeking to hold individual officials liable for violating the students' statutory Title IX rights by "failing to remedy a known hostile environment."[53] Second, another court held that individual officials may be found liable for violating a student's right to equal protection if the individual fails to provide equivalent levels of protection to males and females.[54]

Generally, school officials are entitled to qualified immunity from personal liability where the law is not clearly settled.[55] The courts have split as to whether school officials are entitled to qualified immunity based on the idea that the statutes and cases did not make individuals aware that they might be violating student rights by failing to remedy sexual harassment or treating claims differently.[56] These arguments are, and will likely continue to be, less successful as the expanding case law serves to put school officials on notice of their responsibility to address sexual harassment in schools. Although no consistent pattern has crystallized with regard to individual officials' liability under Section 1983, the cases show that students are achieving some success and will likely obtain better results in the future.

State Law

In addition to Title IX and Section 1983, which are federal claims, several students have alleged violations of various state laws. Examples of the most typical state claims are negligent infliction of emotional distress, negligent supervision, intentional infliction of emotional distress, and violation of state civil rights statutes. The resolution of these claims will vary depending on the particular laws in each state; therefore, schools cannot derive any uniform lessons from these cases. For example, some courts have found suits against school districts and individual officials barred by immunity under state law.[57] In contrast, other states do not provide similar immunity for school districts or their officials.[58] In any event, school officials should be aware of their state's provisions regarding liability for negligent and intentional actions.

Recommendations for Practice

Some of these recommendations extend beyond the legal minimums for more than one reason. First, even though *Davis* establishes a clear federal standard, state law and lower court interpretations create variations that may make legal obligations difficult to identify. Second, OCR has promulgated restrictive guidelines[59] that exceed legal minimums; therefore judicious, school administrators might adhere to these higher standards in order to avoid possible, OCR-imposed sanctions.[60] Finally, as the literature advocates, prudent and professional practice often incorporates more than mere compliance with legal requirements.[61] As with any general legal guidance, administrators should not use this discussion as a substitute for consultation with an attorney when necessary.

- Develop adequate policies and procedures. OCR guidelines require schools to develop and implement policies and procedures that address discrimination, although not specifically sexual harassment.[62] Nevertheless, experts agree that school districts should design effective means for students to bring complaints to school officials and to facilitate prompt and equitable resolutions of such claims.[63] This view has judicial justification, although a school's failure to have a policy in place alone may not constitute a violation of Title IX.[64] Courts have noted the existence of a policy as evidencing a school's efforts to take corrective measures[65] and to provide a reasonable avenue for complaint.[66] Effective policy will contain several elements: 1) a clear definition of sexual harassment; 2) a statement that sexual harassment will not be tolerated;[67] 3) a clear identification of the Title VII and Title IX coordinator(s) so that students, parents, and employees know to whom they must report inappropriate conduct;[68] 4) an outline of the procedure, including rights and options, complainants should follow when pursuing a sexual harassment complaint;[69] 5) an explanation of time-frames for the major stages of the complaint process;[70] 6) a description of sanctions for inappropriate behavior,[71] and 7) a statement prohibiting retaliation against any individual who reports harassment.[72]

- Publicize widely and make the policy available to all members of the school community. All students, employees and parents should receive a copy of the policy.[73] The school should post the policy throughout the school, especially in heavy traffic areas. The school's major publications, such as the school handbook, should include the policy statement.
- Clearly define and ensure that school personnel understand their responsibility regarding sexual harassment. Schools must make sure that all school personnel realize the importance of following the school's sexual harassment policy. Based on the Supreme Court's language in *Davis* that suggests that liability attaches to a school when an official with the authority to institute corrective measures actually knows about harassment, districts must clearly define who has the authority to take remedial actions and make sure that those officials absolutely understand their legal responsibilities.[74] Some authorities might argue that other employees should not convey allegations of harassment to the correct authority as to avoid meeting the *Lago Vista* knowledge standard.[75] Given the rather soft judicial guidance on this precise point, prudent professional practice suggests that schools should make sure each employee understands their independent responsibility to bring any complaints to the attention of the proper authority.[76]
- Provide effective in-service training for school personnel. Training should help staff to learn what sexual harassment is, what its effects are, how to identify signs that harassment is taking place, and how to respond to it.[77] Inservice training should engage teachers and staff in a discussion of appropriate behavior.[78] Court opinions covering a variety of school settings from the school bus, to the cafeteria, hallways, and classrooms[79] give rise to the experts' call to conduct comprehensive staff training.[80] Further, in *Davis*, the Supreme Court buttressed this comprehensive cross-setting approach by finding that school districts may be responsible for any conduct that occurs "under an operation of the funding recipient."[81] Thus,

this language leaves litigants considerable leeway in raising claims for conduct occurring outside of a traditional classroom context.

- Educate students by incorporating lessons on sexual harassment into the curriculum. Schools must convey to students both the seriousness of sexual harassment and effective responses to it. Increasingly, schools accomplish this task by developing or adapting a sexual harassment curriculum.[82] Alternatively, schools may conduct assemblies that focus on sexual harassment.[83] Students, like employees, should learn what sexual harassment is, its effects, how to identify signs that harassment is taking place, and how to respond.[84]
- Create an environment where students feel comfortable reporting and discussing sexual harassment. Schools need to couple the policy and curriculum initiatives with changes in the school environment. Schools must implement policies by actively encouraging students to report harassment immediately to the responsible official.[85] In order to make students feel safe reporting harassment, schools must enforce strong policies against retaliation.[86] In addition to formal processes, schools might also establish discussion groups for male and female students to talk about harassment.[87] Finally, school should offer both punitive and compassionate responses to students, including counseling to both harassers and targets if needed or desired.[88]
- Protect the confidentiality of the parties involved. During the course of the investigation, both experts and courts agree that school officials should make every reasonable effort to preserve the confidentiality of the parties.[89] OCR advises that officials should only reveal names if disclosure is necessary to establish facts.[90]
- Take interim measures to mitigate harassment while conducting an investigation. Schools may need to take steps to curtail harassment while still conducting an investigation. OCR suggests that "these steps may include reporting the incident to law enforcement officials, separating the students, or allowing the person claiming harassment to transfer to another class."[91] Perhaps to comport with the harasser's due process rights, schools should offer the harassee the option of transferring until the investigation is complete, but should not take any negative action against the harasser until the investigation is completed.
- Take all allegations seriously, and conduct thorough investigations. School officials are not often accused of engaging in sex-

ual harassment, but more often accused of being indifferent to it. In light of the *Davis* standard, administrators may survive the clearly unreasonable standard by investigating allegations promptly and taking reasonable corrective measures in a timely fashion.[92] Investigations should be thorough and include: a written statement of facts from the target; separate interviews with the target and the alleged harasser, who both should have the opportunity to have a parent, guardian, or representative present during interviews; interviews and statements from other witnesses; and physical evidence, such as notes and/or pictures of graffiti.[93] Investigators should maintain complete documentation of steps taken and evidence collected.[94] If the investigation yields evidence of sexual harassment, the school should inform the parents of the harasser and the target of the allegations and findings.[95]

- Ensure that action taken to remedy harassment is reasonable and effective. Schools retain discretion over what steps to take when they address sexual harassment; however, courts may review the action to determine if the school's response was both reasonable and effective. One court found the school's response was unreasonable because the school changed the class schedule of the target rather than the harasser.[96] Other examples of behavior courts have identified as the minimal response necessary to demonstrate corrective action include speaking to the harassers[97] and notifying the teachers of the classes shared by the target and harasser.[98] School officials can look forward to additional clarification of the clearly unreasonable standard through litigation already unfolding in the wake of *Davis*.[99]
- In deciding on a response, administrators must make sure their selected action is age appropriate.[100] For example, if an older student inappropriately touches another, school officials may suspend the student; however, if a very young child engages in the same conduct, the school may choose to have a discussion with the child about respect for others and appropriate touching.[101]
- Once the school does act, it should follow-up with the students to make sure the response adequately addressed the conduct. One court implied *in dicta* that a school's inappropriate or unreasonable attempt to curtail the harassment that results in increased harassment might give rise to a due process violation.[102] For example, a school's policy forcing the target and harasser to meet face-to-face that resulted in a heated confrontation resulted in a lawsuit.[103]

- Develop mechanisms to monitor sexual harassment in the schools. In order to understand the extent of sexual harassment in the schools, districts and individual schools will need to find ways to gather information. Some experts suggest using surveys prior to and concurrent with the development of a sexual harassment policy in order to direct the policy towards identified needs.[104] In designing a survey instrument, administrators should ensure that the language is age-appropriate.[105] Some survey instruments are available for use or adaptation by schools.[106] Schools might also use periodic surveys to monitor sexual harassment and refine its policy and training.[107] Before distributing surveys, schools should notify parents that the survey will be conducted and offer the parents an opportunity to opt their child out of participation.[108]

References

[1] American Association of University Women Educational Foundation (AAUW), HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS (1993); *see also*, T. HENRY, *Survey Paints Picture of Sexual Harassment* EDUCATION WEEK, March 3 1,1994, at 4D (a USA Today survey revealed that 55 percent of the delegates to the National Association of Student Councils meeting reported they were touched, grabbed, or pinched in a sexual way during the previous year).

[2] AAUW, *supra* note 1.

[3] Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000(e) *et seq*. (1980).

[4] In contrast, students would possess a clear right to legal action for harassment committed by a teacher or other school employee.

[5] *See infra* notes 18-19 and accompanying text.

[6] Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661 (1999).

[7] 42 U.S.C. § 2000(e) *et seq*..

[8] *See, e. g*., Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

[9] *Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.1 l(c) (1996).

[10] Here "co-equal" is used to distinguish harassment between employees at the same level from harassment of a subordinate employee by a superior.

[11] 29 C.F.R. § 1604.11(d).

[12] 20 U.S.C. § 1681 (1994).

[13] 42 U.S.C. § 1983 (199[illegible].

[14] 20 U.S.C. § 1681(a).

[15] Pub. L. No. 100-259, 102 Stat. 28 (1988).

[16] Cannon v. University of Chicago, 441 U.S. 677 (1979).

[17] Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992).

[18] Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998).

[19] Oona v. McCaffrey, 143 F.3d 473 (9th Cir. 1998); Bosley v. Keainev, 140 F.3d 776 (8th Cir. 1998); Doe v. University of Illinois, 138 F.3d 653 (7th Cir. 1998); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996); Doe v. Londonderrv Sch. Dist., 970 F. Supp. 64 (D.N.H. 1997); Piwonka v. Tidehaven Indep. Sch. Dist., 961 F. Supp. 169 (S.D. Tex. 1997); Collier v. William Penn Sch. Dist.. 956 F. Supp. 1209 (E.D. Pa. 1997); Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412 (N.D. Iowa 1996); Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162 (N.D.N.Y. 1996); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996).

[20] Doe v. Oyster River Cooperative Sch. Dist., 992 F. Supp. 467 (D.N.H. 1997); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369 (N.D. Cal. 1997); Alton v. Board of Educ. of Boyne City Public Sch., 1997 U.S. Dist. LEXIS 20046 (W.D. Mich. 1997); Franks v. Kentucky Sch. for the Deaf, 956 F. Supp. 741 (E.D. Ky. 1996); Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415 (N.D. Cal. 1996).

[21] Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1999 (1998), *Davis*, 119 S. Ct. 1661 at 1674 (1999).

[22] *Id* at 1671.

[23] Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1016 (5th Cir. 1996).

[24] *See, e. g.*, Doe v. University of Illinois, 138 F.3d 653, 662 (7th Cir. 1998) ("[O]ccasional exceptions do not alter the rule that sexual harassment is an evil that affects mostly women and girls. For this reason, it must be exceedingly rare that a school receives any complaints of sexual harassment from its male students. The Fifth Circuit's rule would leave schools completely free to ignore the more frequent complaints of sexual harassment from girls, while imposing only the minimal cost that such schools would be required to likewise ignore any complaints they might receive from their male students").

[25] *Rowinsky*, 80 F.3d at 1016 (5th Cir. 1996).

[26] Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1420 (N.D. Iowa 1996).

[27] Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 74 (D.N.H. 1997).

[28] Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1419 (N.D. Iowa 1996).

[29] *Alton*, 1997 U.S. Dist. LEXIS 20046 (W.D. Mich. 1997).

[30] Oona v. McCaffrey, 143 F.3d 473 (9th Cir. 1998); Doe v. University of Illinois, 138 F.3d 653 (7th Cir. 1998); Doe v. Oyster River Cooperative Sch. Dist., 992 F. Supp. 467 (D.N.H. 1997); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369 (N.D. Cal. 1997); Franks v. Kentucky Sch. for the Deaf, 956 F. Supp. 741 (E.D. Ky. 1996); Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415 (N.D. Cal. 1996); Bruneau v. South Kortright Central Sch. Dist., 935 F. Supp. 162 (N.D.N.Y. 1996).

[31] Doe v. Oyster River Cooperative Sch. Dist., 992 F. Supp. at 480 (1997).

[32] *Bruneau*, 935 F. Supp. at 172 (N.D.N.Y. 1996).

[33] *Id.* at 177.

[34] Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1999 (1998).

[35] *Davis*, 119 at 1674 (1999).

[36] *Id.*

[37] *Id.* at 1675 (1999).

[38] Mennone v. Gordon, 889 F. Supp. 53 (D. Conn. 1995).

[39] Collier v. William Penn Sch. Dist., 956 F. Supp. 1209 (E.D. Pa. 1997); *Alton*, 1997 U.S. Dist. LEXIS 20046 (W.D. Mich. 1997); Franks v. Kentucky Sch. for the Deaf, 956 F. Supp. 741 (E.D. Ky. 1996); Burrow v. Postville Comm. Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996); Garza v. Galena Park Indep. Sch. Dist., 914 F. Supp. 1437 (S.D. Tex. 1994).

[40] 20 U.S.C. § 1681(a).

[41] *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034 (Mar. 13, 1997) (this guidance does not appear to have the full force of administrative regulations).

[42] *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 55512-01 (notice)(Jan. 19, 2001). (this guidance does not appear to have the full force of administrative regulations).

[43] Similar to regulations, administrative agencies' guidelines are entitled to deference by the courts as long as the interpretation is consistent with the language of the statute. Young v. Community Nutrition Inst., 476 U. S. 974, 981-2 (1986) (accordingly, if the court determines the agency identified stronger standards than Congress intended in its language, the courts may disregard the agency's interpretation).

[44] 42 U.S.C. § 1983.

[45] *See, e. g.*, J. HORNER, *The Anatomy of a Constitutional Tort*, 47 EDUC. L. REP. 1 (1998).

[46] In contrast, although students have attempted to bring suit for Title IX statutory violations using Section 1983, several courts have determined that students may not sue districts under this indirect approach Title IX, because Title IX provides a comprehensive scheme of enforcement. Seamons v. Snow 84 F.3d 1226 (10th Cir. 1996); Bruneau v. South Kortright Central Sch. Dist., 935 F. Supp. 162 (N.D.N.Y. 1996); Mennone v. Gordon, 889 F. Supp. 53 (D. Conn. 1995).

[47] Bosley v. Kearney, 140 F.3d 776 (8th Cir. 1998); Doe v. Oyster River Cooperative Sch. Dist., 992 F. Supp. 467 (D.N.H. 1997); Collier v. William Penn Sch. Dist., 956 F. Supp. 1209 (E.D. Pa. 1997); Burrow v. Postville Comm. Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996); Mennone v. Gordon, 889 F. Supp. 53 (D. Conn. 1995); Garza v. Galena Park Indep. Sch. Dist., 914 F. Supp. 1437 (S.D. Tex. 1994).

[48] *See, e. g.*, Collier v. William Penn Sch. Dist., 956 F. Supp. 1209, 1214 (*citing* Albright v. Oliver, 510 U.S. 266 (1994)).

[49] Doe v. Londonderry Sch. Dist., 970 F. Supp. 64 (D.N.H. 1997).

[50] Oona v. McCaffrey, 143 F.3d 473 (9th Cir. 1998); Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).

[51] *Nabozny*, 92 F.3d at 455 (7th Cir. 1996)..

[52] *Id*. at 454-5.

[53] *Oona*, 143 F.3d at 477 (9th Cir. 1998); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369 (N.D. Cal. 1997).

[54] *Nabozny*, 92 F.3d at 446 (7th Cir. 1996).

[55] Wood v. Strickland, 420 U.S. 308 (1975).

[56] Compare *Oona*, 143 F.3d 473 (9th Cir. 1998); *Nabozny*, 92 F.3d 446 (7th Cir. 1996); Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369 (N.D. Cal. 1997), with Mennone v. Gordon, 889 F. Supp. 53 (D. Conn. 1995); Garza v. Galena Park Indep. Sch. Dist., 914 F. Supp. 1437 (S.D. Tex. 1994).

[57] *Nicole M.*, 964 F. Supp. at 1369; *cf.* Collier v. William Penn Sch. Dist., 956 F. Supp. 1209 (E.D. Pa. 1997) (granting immunity to districts and individuals for negligence but rejecting immunity for individuals on claims of an intentional tort, such as intentional infliction of emotional distress).

[58] *See, e. g.*, Burrow v. Postville Comm. Sch. Dist., 929 F. Supp. 1193, 1210 (N.D. Iowa 1996).

[59] Pub. L. No. 100-259, *See, supra* note 15 and accompanying text.

[60] T. Duncan & M. J. Rapport, *Understanding and Implementing OCR's Sexual Harassment Guidance*, 124 Educ. L. Rep. 21 (1998).

[61] *See, e. g.*, A. Cohen, et al., Sexual Harassment And Sexual Abuse: A Handbook For Teachers And Administrators (1996).

[62] 62 Fed. Reg. 12034.

[63] Duncan & Rappoet, *supra* note 56; M. McCarthy, *The Law Governing Sexual Harassment in Public Schools*, 20 Phi Delta Kappa Res. Bull. 15 (1998); D. P. Thompson & A. Truelock, *Student-to-Student Sexual Harassment: Sifting Through the Wreckage*, 125 Educ. L. Rep. 1037 (1998).

[64] *Gebser*., 118 S. Ct. 1989 (1998).

[65] Doe v. Oyster River Cooperative Sch. Dist., 992 F. Supp. 467 (D.N.H. 1997).

[66] *See Gebser*., 118 S. Ct. 1989, 1999 (1998).

[67] McCarthy, *supra* note 59; Office For Civil Rights, Sexual Harassment: It's Not Academic (1991); L. D. Webb, K. H. Hunnicutt & A. Metha, *What Schools Can Do to Combat Student-to Student Sexual Harassment*, 81 NASSP Bull. 72 (1997).

[68] Duncan & Rapport, *supra* note 56; McCarthy, *supra* note 59; Webb, Hunnicutt, & Metha, *supra* note 63.

[69] Thompson & Truelock, *supra* note 59.

[70] *See* OCR, *supra* note 63 an accompanying text.

[71] McCarthy, *supra* note 59; Webb, Hunnicutt, & Metha, *supra* note 63.

[72] N. Stein, *Slippery Justice*, Educ. Leadership, May 1996, at 64.

[73] McCarthy, *supra* note 59.

[74] *Gebser*, 118 S. Ct. 1989 (1998).

[75] *Id*. at 2204 (Stevens, J., *dissenting*).

[76] Duncan & Rapport, *supra* note 56.

[77] Duncan & Rapport, *supra* note 56.

[78] McCarthy, *supra* note 59.

[79] *See, e. g.*, Doe v. Petaluma Citv Sch. Dist., 949 F. Supp. 1415 (N.D. Cal. 1996).

[80] Stein, *supra* note 68.

[81] *Davis*, 119 S. Ct. at 1672-73.

[82] Webb, Hunnicutt, & Metha, *supra* note 63; *see also*., N. Stein & L. Sjostrom, Flirting Or Hurting: A Teacher's Guide On Student-To-Student Sexual Harassment In Schools (Grades 6 Through 12) (1994).

[83] McCarthy, *supra* note 59.

[84] *Id*.

[85] OCR, *supra* note 63.

[86] *Id.*

[87] *Id.*

[88] STEIN, *supra* note 68; WEBB, HUNNICUTT & METHA, *supra* note 63 [*citing* D. THOMPSON, *Effectively Addressing Student Peer Sexual Assault*, 4 AM. SECONDARY EDUC. 5 (1995); L. ROWELL, M. C. MCBRIDE, and J. NELSON-LEAF, *The Role of the School Counselor in Confronting Peer Sexual Harassment*, THE SCHOOL COUNSELOR 196 (1996)].

[89] OCR, *supra* note 63; WEBB, HUNNICUTT & METHA, *supra* note 63; *see also*, Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369 (N.D. Cal. 1997).

[90] OCR, *supra* note 63.

[91] *Id.*

[92] MCCARTHY *supra* note 59.

[93] WEBB, HUNNICUTT, & METHA, *supra* note 63.

[94] *Id.*

[95] *Id.*

[96] Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1386 (N.D. Cal. 1997).

[97] *Id.* at 1386.

[98] Doe v. Oyster River Coop. Sch. Dist., 992 F. Supp. 467 (D.N.H. 1997).

[99] *See, e.g.*, Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736 (9th Cir. 2000); Murrell v. School Dist. No. 1, 186 F.3d 1238 (10th Cir. 1999); Ray v. Antioch Sch. Dist., 107 F. Supp.2d 1165 (N.D. Cal. 2000); Manfredi v. Mount Vernon Bd. of Educ., 94 F. Supp.2d 447 (S.D.N.Y. 2000).

[100] OCR, *supra* note 63; STEIN, *supra* note 68.

[101] OCR, *supra* note 63.

[102] Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 76 (D.N H. 1997).

[103] STEIN, *supra* note 68.

[104] STEIN, *supra* note 68; WEBB, HUNNICUT, & METHA, *supra* note 63.

[105] WEBB, HUNNICUT, & METHA, *supra* note 63.

[106] *See, e. g.*, AAUW, *supra* note 1; MINNESOTA DEPARTMENT OF EDUCATION, SEXUAL HARASSMENT TO TEENAGERS: IT'S NOT FUN; IT'S ILLEGAL (1993).

[107] OCR, *supra* note 63.

[108] WEBB, HUNNICUT, & METHA, *supra* note 63.

7

Student Records

Richard J. Dickinson and Patrick J. Schmitz

Introduction

In 1974, Congress passed the Family Educational Rights and Privacy Act (FERPA or the Act),[1] which applies to any educational agency or institution receiving federal funds.[2] FERPA requires local boards of education to provide parents and students with an annual notice communicating FERPA rights and responsibilities.[3] The Act provides parents the right to inspect and review the education records of their minor child,[4] the right to seek to amend those records,[5] and the right to limit disclosure of information from the records to third parties without parental consent.[6]

Since virtually all public schools are recipients of federal funding,[7] virtually all public elementary and secondary schools are subject to FERPA requirements.[8] Education records generally are defined as records which are directly related to a student and maintained by an institution or party acting for the institution.[9] When a student turns 18 or enters a post-secondary institution, FERPA classifies him or her as an "eligible student" and transfers the rights under the Act from the parent to the student.[10] FERPA also prohibits a school from providing information for at least five years to a third party who received information and re-disclosed it without the required consent.[11] In general, "education records"[12] may be released under the following circumstances: 1) with parental consent (or student consent if the student is age 18 or older or is enrolled in a post-secondary institution), 2) if the records are "directory information," with the right of the parent to object within a reasonable period of time to the release of some or all of the information[13] and 3) to specified persons and organizations granted access by law.[14]

Some states have similar privacy and confidentiality laws that also address the issue of sharing information from education records. Laws in some states place limitations on release of student records which exceed those of the federal law. The reader is cautioned to obtain information about state laws which might affect the implementation of FERPA.

Legal Issues

Definitions

"Education records" generally include any records in the possession of an educational institution or by a third party acting for the agency or institution which contain information directly related to a student, with certain exceptions as discussed below.[15] Record means any information recorded in any way, including, but not limited to handwriting, print, computer media, video or audio tape, film, microfilm and microfiche.[16] FERPA coverage is also extended to transcripts or other records obtained from a school in which a student was enrolled.[17] At least one federal court has interpreted FERPA to prohibit students from grading each other's papers.[18] The term education record does not include private notes in the exclusive possession of educational personnel which are not accessible or revealed to any other person except a temporary substitute for the maker of the record,[19] law enforcement records solely for law enforcement purposes,[20] records on a student who is 18 or older, or who is attending an institution of post-secondary education relating to treatment provided by a physician, psychiatrist, psychologist or other recognized professional or paraprofessional acting in his or her professional capacity and disclosed only to individuals providing treatment,[21] and records that only contain information about an individual after he or she is no longer a student at that institution.[22] Arguably, discussions between school officials about their personal observations of a student may be disclosed to almost anyone else, as long as the comments are not based on information contained in student records.[23] Similarly, disclosure by a school district of certain confidential student information would not fall under the prohibitions of FERPA if the information was derived from a source independent of the school's records.[24]

"Directory information" means information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed.[25] It includes, but is not limited to the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, grade level, enrollment status (e.g. undergraduate or graduate; full-time or part-time), degrees, honors and awards received, and the most recent previous educational agency or institution attended.[26] "Dates of attendance" includes the overall period of time that a student attends an educational agency or institution, such as academic years or semesters. It does not include specific daily records of a student's attendance. Any educational agency or institution making public directory information available is required to give public notice of the categories of information which it has so designated.[27] It must also allow a reasonable period of time after such notice is given for the parent to notify the institution or agency in writing that any or all of the information designated should not be released.[28] If an institution does not define the scope of directory information, give public notice, or seek parental consent as required by FERPA, it is not permitted to release the information.[29]

"Personally identifiable information" includes, but is not limited to, directory information, the name of the student's parent or other family members, address of the student or student's family, a social security number or student number, or a list of personal characteristics that would make the student's identity easily traceable.[30] Disclosure of standardized test scores in a scrambled order and with the name of students deleted would suffice to safeguard the privacy of students.[31] If an education record of a student contains information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student.[32]

"Parent" means a natural parent, a guardian, or a person acting as a parent in the absence of a parent or guardian.[33] Thus, foster parents who are acting as a child's parent would have the rights afforded natural parents under FERPA with respect to that child's education records. Disclosure means to permit access to or the release, transfer or other communication of personally identifiable information contained in an education record to any party, by any means, including oral, written, or electronic means.[34]

Implications

Prior written consent is not required for release of information to: 1) other school officials that have "legitimate educational interests"; 2) officials of another school or school system in which the student seeks or intends to enroll, so long as the parents are notified of the transfer, receive a copy of the record if desired, and have an opportunity to challenge the records' contents; 3) parents of a "dependent student;" 4) federal, state, and local education authorities involving an audit, evaluation, or compliance with education programs; 5) officials processing student financial aid; 6) educational agencies or institutions in organizing and conducting studies and improving instruction so long as personally identifiable information is not disclosed; 7) accrediting organizations; 8) officials complying with a judicial order or subpoena for a Federal Grand Jury proceeding or for a law enforcement purpose even if the school has been ordered not to disclose its existence; 9) a court, if a school institutes legal action involving the parent or student; 10) appropriate persons in connection with an emergency if release of the information is needed to protect the health or safety of the student or others; and 11) state and local authorities to whom such information is specifically allowed to be reported pursuant to state statute. Personal information may only be released to a third party on the express condition that the information will not be disclosed without the written consent of the student/parent.[35]

Each institution must maintain a record, to be kept with the education record of each student, that indicates all individuals (other than school officials who have legitimate education interests) that have requested or obtained access to a student's education record and the specific legitimate interest for requesting the information.[36] This record of access is available only to parents, school officials, records custodians, and those authorized by law.[37] Records of disclosures and requests for disclosures of the student's academic record other than to the student or others in response to written requests from the student, or to school officials are considered a part of the student's academic record and must be retained as long as the academic record is retained by the institution.[38]

Access By Non-custodial Parents

FERPA does not distinguish between custodial and non-custodial parents. An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, state statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.[39] Arguably, non-custodial parents have the same right of access to education records as custodial parents absent any court order, divorce decree, or state law indicating otherwise.[40] A signed statement alone by a parent will not serve to bar the other parent from access to student records.[41]

Access to information for non-custodial parents or for a joint custody parent with whom a child is not living during the school year presents a challenge for schools, particularly where that information must be mailed to each parent. FERPA permits a school to "charge a fee for a copy of an education record which is made for the parent or eligible student," unless the imposition of the fee effectively prevents a parent/student from inspecting the record.[42] As such, a non-custodial parent may be placed on a school's mailing list and receive the same information that is mailed to the custodial parent.[43] The custodial and/or non-custodial parent may be charged a fee for actual expenses incurred by the school for providing such records.[44]

Special Education Students

State education agencies and institutions must afford special education students the same privacy rights as other students.[45] Addressing the confidentiality of special education students presents a different challenge for school officials because the IDEA has its own requirements concerning disclosure of student information. Parents must consent to the disclosure of student information and must also be notified when personally identifiable information "is no longer needed to provide educational services to the child." The same exceptions to parental consent apply, for example, if the disclosure is made to "other school officials who have legitimate educational interests."[46] Thus, IDEA issues of access to student information are not significantly different than those encountered under FERPA generally, i.e. the desire to prevent the student from being "stigmatized and humiliated if sensitive information in the record is made public."[47] Documents used in the placement of children with handicapping conditions in specialized classes are considered to be personally identifiable records, limiting release of such records only pursuant to a subpoena or pursuant to prior parental release.[48]

Health and Safety Emergency

The Secretary has not issued definitive regulations specifying what is a "health or safety emergency."[49] There must be a need for knowledge of the information to protect the health or safety of the student or of other persons.[50] Therefore, great caution should be used when declaring an emergency situation. The information must only be shared with parties who need the information to avert the emergency, i.e. those with legitimate purposes for the information.[51] Some examples of such incidents may include on-campus disruptions involving criminal acts, especially those involving controlled substances or weapons, or off-campus situations that affect campus or public safety.

Law Enforcement Exception

FERPA specifically exempts from the definition of "education records" those records that a law enforcement unit of a school or school district creates and maintains for a law enforcement purpose.[52] FERPA defines a law enforcement unit as "an individual, office, department, component" of a school or school district that is officially authorized or designated by the school district to enforce federal, state, or local law or that maintains the physical safety and security of the school district.[53] Nothing in FERPA prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce any state, local or federal laws.[54]

The 1996 amendment to FERPA allows an exchange between schools of information in a student's education record concerning disciplinary action taken against such student for conduct that posed a "significant risk to the safety or well-being of the student, other students, or other members of the school community."[55] Under FERPA, schools may disclose such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.[56] The regulations give individual schools the discretion to determine the circumstances under which it is appropriate to disclose information.

State law may grant public access to law enforcement unit records. FERPA does not require nor prohibit the disclosure by any educational agency or institution of its law enforcement unit records.[57] Schools may receive and use information from law enforcement, courts, and other justice agencies in order to maintain a safe learning environment. Once information is received and maintained by the school, it becomes subject to FERPA and any applicable exceptions.[58] Records in an attorney's file relating to a student's juvenile proceedings may be deemed education records.[59]

State law may authorize an administrator to share education records with juvenile justice authorities in order to help students at risk or involvement with the juvenile justice system, or in other situations where a student has been apprehended for a crime, but has not yet been adjudicated delinquent.[60] The juvenile justice agency must agree in writing not to disclose the records to anyone other than a juvenile justice agency official.[61] The disclosure should relate to the juvenile justice system's ability to serve the minor prior to an adjudication of delinquency.[62]

Challenging Records' Accuracy

FERPA provides a right on the part of the eligible student (if age 18 or older) or the student's parent, to inspect and review the student's education record, to challenge the accuracy of the information contained within, and to prevent the dissemination of the record in certain instances. Requests for access to education records must be granted within a reasonable period of time, but in no case more than forty-five days after the request has been made.[63] Students have the right to request that records that are inaccurate, misleading or in violation of their privacy rights be corrected. Parents or legal guardians of students may establish their right to review student records provided the parents or guardians can document the student's dependency as defined by the Internal Revenue Code, Section 152.

Federal law provides a remedy for a parent/student who feels that certain education records are inaccurate or misleading, or that the student's privacy has been violated by including certain information. The parent/student may request that the institution amend the education record. Once the parent or adult student has made the request, the district must respond within a reasonable period of time. If the institution agrees to amend the record, nothing further needs to be done. If the institution refuses, the parent/student must be notified of the right to a hearing on the matter.[64] The educational institution or agency must give the parent notice of the date, time, and place reasonably in advance of the hearing.[65] Then the hearing, if requested, must take place within a reasonable time.[66]

The hearing may be conducted by any person, including an official of the institution who does not have a direct interest in the outcome.[67] The parent/student must be given an opportunity to present all evidence relevant to the issues and may be assisted or represented by an individual at his/her own expense, including an attorney.[68] The final decision as to whether to amend or delete the material at issue belongs to the institution. The decision must be made based upon evidence presented at the hearing and must include a summary of the evidence and reasons for the decision.[69] If the parent/student still disagrees with the institution, he/she may put a statement to that effect in the education record.[70] This statement of dispute must be kept in the education record as long as the disputed information is retained.[71]

Enforcement of FERPA

Enforcement of FERPA is the responsibility of the Family Policy Compliance Office of the U.S. Department of Education. The Office provides assistance on FERPA to education agencies and institutions, state and local officials, and parents. The office also investigates alleged violations of the law.[72] Parents/students have the right to file a written complaint with the U.S. Department of Education concerning an alleged failure of compliance with the requirements of FERPA.[73] A written complaint alleging specific violations of the Act must be filed within 180 days of the date of the alleged violation, absent good cause.[74] The Office then notifies the parent and the educational agency if it will begin an investigation of a complaint.[75] The notice to the educational agency includes the substance of the alleged violation and asks the agency to submit a written response to the complaint.[76] The parent will also be notified when the Office does not initiate an investigation if a complaint fails to meet certain requirements.[77]

After an investigation of the complaint, the Office provides the educational agency and the parent/student written notice of its findings and the basis for such findings.[78] If the educational agency has not complied with FERPA, the Office will include a statement of the specific steps that must be taken for the institution to comply and must allow a reasonable time for compliance.[79] If the institution or educational agency does not comply either voluntarily or within a reasonable time, the Secretary may withhold further payments, issue a cease and desist order, or terminate eligibility to receive funding under any applicable program.[80]

Recommendations for Practice

FERPA may supersede state law where federal and state law conflict. Laws vary by state. The laws of some states specify what will be considered directory information. Ohio law, for example, also prohibits the release of even directory information if it is sought for a profit-making purpose.[81] It is important to look at the state's open records and freedom of information laws for additional guidance. School officials may also find protection from liability when acting pursuant to state law.

- FERPA no longer imposes a requirement that schools have a student records policy at all. Nevertheless, it is highly recommended that you maintain a student records policy. Instead of requiring a local policy, the regulations now require that you provide an annual notice to parents and students.
- In the notice, education institutions are required to advise parents of their rights under the federal law and regulations to inspect student records. Students/parents must be notified annually of the categories of personally identifiable information

which the institution has designated as directory information and will release without written consent of the student/parents. The notice must also inform parents and students of their right to refuse to permit the disclosure of directory information from their files and the time period for submitting a written statement refusing to allow the release of directory information.

- The annual notice must contain the foregoing information and should set forth the procedures for exercising the right to inspect and review education records and for requesting an amendment of student records. The notice must state whether you have a policy of disclosing student records to other school officials within your district. If so, the notice must list your criteria for deciding who is a school official, and what constitutes a legitimate educational interest which permits such officials to review student records.
- Administrators are required to transmit the annual FERPA notice to disabled persons and parents who have a primary or home language other than English in an "effective way." This may mean the use of alternate formats for the annual notice, such as audio tape, braille, computer diskette or large print documents.
- In light of the technology revolution, the use of computerized record-keeping is ever increasing. This data will replace most paper documents. Keep in mind, however, that the same principle of confidentiality must be applied to electronic data as to paper documents.
- Many records will contain information about more than one student. A requesting parent, however, is entitled to see information relating to only his/her child. In this situation, redaction of information about other students must be done by the school district prior to making the documents available to a parent. Copying techniques or blackening of information can be used to accomplish this objective.
- The school system's records custodian must be aware that custodial and non-custodial parents have equal rights of access to their child's records, absent a court order limiting those rights. A parent who asserts a desire to limit records access to the other parent should be informed that the school district is unable to do so unless the parent produces a valid court order so specifying.
- School districts are urged to develop comprehensive student records policies to provide guidance to parents and to school

personnel. Such policies may be developed with guidance from the district's legal counsel.

References

[1] 20 U.S.C. § 1232g; 34 C.F.R. § 99.
[2] 20 U.S.C. § 1232g(a)(1)(A).
[3] 20 U.S.C. § 1232g(e); 34 C.F.R. § 99.7.
[4] 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.7.
[5] 20 U.S.C. § 1232g(a)(2).
[6] 20 U.S.C. § 1232g(b)(1).
[7] 20 U.S.C. § 1232g(a)(3).
[8] 20 U.S.C. § 1232g(a)(1)(A).
[9] 20 U.S.C. § 1232g(a)(4)(A).
[10] 20 U.S.C. § 1232g(d).
[11] 20 U.S.C. § 1232g(b)(4)(B).
[12] 20 U.S.C. § 1232g(a)(4)(A).
[13] 20 U.S.C. § 1232g(a)(5)(B).
[14] 20 U.S.C. § 1232g(b)(1).
[15] 20 U.S.C. § 1232g(a)(4)(B); 34 C.F.R. § 99.3(a).
[16] 20 U.S.C. § 1232g; 34 C.F.R. § 99.3.
[17] 20 U.S.C. § 1232g(a)(4).
[18] Falvo v. Owasso, 229 F.3d 956 (10th Cir. 2000)
[19] 20 U.S.C. § 1232g(a)(4)(B)(i); 34 C.F.R. § 99.3(b)(1).
[20] 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.3(b)(2).
[21] 20 U.S.C. § 1232g(a)(4)(B)(iv); 34 C.F.R. § 99.3(4)(i-iii).
[22] 20 U.S.C. § 1232g(a)(4); 34 C.F.R. § 99.3(5).
[23] 20 U.S.C. § 1232g(a)(4)(B)(i); 34 C.F.R. § 99.3(b)(1).
[24] Frasca v. Andrews, 463 F. Supp. 1043 (D.C.N.Y. 1979) (confidential information in a letter printed in a high school newspaper is not protected because it was derived from a source independent of an education record).
[25] 20 U.S.C. § 1232g(a)(5)(A); 34 C.F.R. § 99.3.
[26] *Id.*
[27] 20 U.S.C. § 1232g(a)(5)(B).
[28] *Id.*
[29] Brent v. Paquette, 567 A.2d. 976 (N.H. 1989).
[30] 20 U.S.C. § 1232g; 34 C.F.R. § 99.3.
[31] Kryston v. Bd. of Ed., East Ramapo Cent. Sch. Dist, 430 N.Y.S.2d 688 (1980).
[32] 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.12(a).
[33] 20 U.S.C. § 1232g; 34 C.F.R. § 99.3.
[34] 20 U.S.C. § 1232g(b)(1); 34 C.F.R. § 99.3.
[35] 20 U.S.C. § 1232g(b)(4)(B).

[36] 20 U.S.C. § 1232g(b)(4)(A); 34 C.F.R. § CFR 99.32.
[37] *Id.*
[38] *Id.*
[39] 20 U.S.C. § 1232g; 34 C.F.R. § 99.4.
[40] *Id.*
[41] Page v. Rotterdam-Mohansen Cent. Sch. Dist.,, 441 N.Y.S.2d 323 (1981).
[42] 20 U.S.C. § 1232g(a)(1); 34 C.F.R. § 99.11.
[43] Fay v. South Colonie Cent. Sch. Dist. 802 F.2d 21, (2d. Cir. 1986).
[44] *Id.*
[45] 34 C.F.R. §§ 300.560-300.576 (contain requirements regarding the confidentiality of information relating to handicapped children who receive benefits under the IDEA).
[46] *See* M.R. v. Lincolnwood Bd. of Educ. Dist. 74, 843 F. Supp. 1236 (N.D. Ill. 1994), *reconsideration denied,aff'd* 56 F.3d 67, *rehearing denied.*
[47] Webster Groves Sch. Dist. v. Pulitzer Publishing Company, 898 F.2d. 1371, 1375 (8th Cir. 1990).
[48] Mattie T. v. Johnston, 74 F.R.D. 498 (D.C. Miss. 1976).
[49] 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. § 99.36.
[50] *Id.*
[51] 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.36.
[52] 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8.
[53] 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8.
[54] 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8(c)(1).
[55] 20 U.S.C. § 1232g(h)(1).
[56] 20 U.S.C. § 1232g(h)(2).
[57] 34 C.F.R. § 99.8(d).
[58] 34 C.F.R. § 99.8(c)(2).
[59] Belanger v. Nashua, New Hampshire Sch. Dist., 856 F. Supp. 40(D.N.H. 1994).
[60] 20 U.S.C. § 1232g(b)(1)(J); 34 C.F.R. § 99.38.
[61] *Id.*
[62] *Id.*
[63] 20 U.S.C. § 1232g(a)(1)(A).
[64] 20 U.S.C. § 1232g(a)(2); 34 C.F.R. § 99.21.
[65] 20 U.S.C. § 1232g(a)(2); 34 C.F.R. § 99.22(b).
[66] 20 U.S.C. § 1232g(a)(2); 34 C.F.R. § 99.22(a).
[67] 20 U.S.C. § 1232g(a)(2); 34 C.F.R. § 99.22(c).
[68] 20 U.S.C. § 1232g(a)(2); 34 C.F.R. § 99.22(d).
[69] 20 U.S.C. § 1232g(a)(2); 34 C.F.R. § 99.22(f).
[70] 20 U.S.C. § 1232g(a)(2); 34 C.F.R. § 99.21(c).
[71] *Id.*

[72] 20 U.S.C. § 1232g(f); 34 C.F.R. § 99.64(a-d).
[73] 20 U.S.C. § 1232g(g); 34 C.F.R. § 99.63.
[74] 20 U.S.C. § 1232g(g); 34 C.F.R. § 99.64.
[75] 20 U.S.C. § 1232g(g); 34 C.F.R. § 99.65.
[76] *Id.*
[77] 20 U.S.C. § 1232g(g); 34 C.F.R. § 99.65.
[78] 20 U.S.C. § 1232g(f); 34 C.F.R. § 99.66.
[79] *Id.*
[80] 20 U.S.C. § 1232g(f); 34 C.F.R. § 99.67(a).
[81] Ohio Revised Code § 3319.321.

Special Education And The Law

8

Federal Disability Law

Julie F. Mead and Judith Risch

Introduction

In today's world of site-based management, principals must have a working knowledge of a number of topics. Without question, a firm grasp of federal disability law should be one of those competencies. Knowledge of federal disability law bears strong connections to the principal's focus on providing instructional leadership for a diverse teaching staff and an even more diverse student body, while at the same time championing equity in all workings of the school.[1] The precepts of Section 504 of the Rehabilitation Act of 1973,[2] the Individuals with Disabilities Education Act,[3] and the Americans with Disabilities Act,[4] affect classroom instruction, student discipline, hiring and supervision of staff, and relationships with parents. All three acts are premised on the notion that in order for individuals with disabilities to enjoy equal educational or employment opportunities, sometimes difference of treatment must be applied. For example, equity requires that some deaf children be furnished with a sign language interpreter in order to access the learning of the classroom. Likewise, equity may require that a worker who uses a wheelchair for mobility be allowed to rearrange his office space in order to allow for better accessibility to the files and equipment necessary to do the job. Understanding the boundaries formed by these three federal disability statutes empowers the principal both by helping to specify what is required, and by elucidating the degrees of freedom available for creative use of building and district resources.

Legal Issues

Section 504 of the Rehabilitation Act of 1973

Of the three laws, Section 504 of the Rehabilitation Act of 1973 is the oldest and in some ways the simplest. As a civil rights statute, its purpose is straightforward; it bars discrimination on the basis of disability by any recipient of federal funds.[5] As such, it applies to all public schools in the United States and a number of private schools that also receive federal monies. Accordingly, schools and school districts must ensure that all the programs offered are accessible to persons with disabilities. As an anti-discrimination statute, its coverage extends from birth to death. Therefore it has implications for students, employees, parents, and members of the general public who wish to access the benefits created by a school.

Principals are probably most familiar with its application to students. Those students who have a "physical or mental impairment which substantially limits one or more of such person's major life activities"[6] must receive an education comparable to that of their non-disabled peers.[7] Major life activities include, among others, walking, talking, hearing, seeing, breathing, and learning.[8] The disability may be permanent (e.g., a visual impairment, cerebral palsy, or attention deficit disorder) or it may be temporary (e.g., a broken leg).[9] Section 504 also applies to students with acquired immune deficiency syndrome (AIDS)[10] or who test positive for human immuno-deficiency virus (HIV).[11] In addition, care must be taken so that personnel do not discriminate against a person based on a perceived disability where one does not exist.[12] Although some argue these last two eligibility categories extend the protections of Section 504 to nearly everyone, the point is that discrimination is no less abhorrent simply because the person or persons discriminating jumped to erroneous conclusions. Whether or not the disability actually exists, Section 504 protects individuals from discriminatory treatment based on the status characteristic of the disability.

Once a child with a disability is identified, Section 504 requires that s/he receive meaningful access to the educational program provided by a school. Providing an education comparable to that of nondisabled peers means that school personnel may be required to make reasonable accommodations in order that the student's disability does not serve as a barrier to how the child can access information or demonstrate learning.[13] Reasonable accommodations may be physical (e.g., braille, preferential seating, a note taker, assistance with carrying supplies) or instructional (e.g., a sign language interpreter, extended time on a test, vocabulary assistance) and may include special education and related services.[14] Accommodations are determined by staff members in consultation with the parents[15] and are outlined on an accommodation plan. Although regulations do not require it, most schools prudently use written accommodation plans.[16]

Section 504 also has implications for hiring and working with staff. Again, those protected by the act have mental or physical impairments that substantially limit them or have a history of such impairments or are regarded as having such.[17] And just as students must be reasonably accommodated in order to access educational opportunities, employees' disabilities must be reasonably accommodated in order to access employment opportunities.[18] Reasonableness has its bounds, however, and employers are not required to substantially alter the qualifications or requirements of a job in order to accommodate a worker's disability.[19] In addition, the employer is not expected to bear undue administrative or financial burdens when considering accommodations.[20]

Parents with disabilities also enjoy protection under Section 504. In this case, the school must take care to be sure that parents with disabilities, through reasonable accommodations when necessary, have access to parent-teacher conferences and any meetings concerning the child's progress and behavior in school.[21] For example, a teacher planning to meet with a parent who utilizes a wheelchair for mobility would have to be sure the meeting place was accessible to the parent.

Americans with Disabilities Act

Using its constitutional power to regulate interstate commerce,[22] Congress enacted the Americans with Disabilities Act (ADA) in 1990.[23] The ADA extends the non-discrimination protections of Section 504 beyond recipients of federal financial support to private employers and commercial establishments.[24] The law is divided into five titles:

- Title I - prohibits employment discrimination.[25]
- Title II - applies to all subdivisions of state and local government, regardless of whether they receive federal financial assistance.[26] Students in public schools are protected under this title.
- Title III - prohibits discrimination by businesses that serve the public (e.g., stores, restaurants, hotels and motels, etc.).[27] Title III's provisions also apply to non-sectarian private schools, although private schools are not held to the same programmatic accessibility as are public schools. Private schools need only accommodate those children with disabilities that can be served with minor adjustments to the academic program.
- Title IV - applies to telecommunications services such as telephone and television companies.[28]
- Title V - contains several miscellaneous, but important, provisions including a statement that ADA should not be read to require lesser standards than those of Section 504;[29] that a

> state's immunity from suit under the Eleventh Amendment is abrogated by the ADA;[30] that ADA's provisions apply to Congress and all agencies of the legislative branch;[31] that the term "individual with a disability" does not include active drug users[32] or transvestites;[33] and that homosexuality or bisexuality are not "impairments" under the ADA and that various other conditions are not included under the term disability.[34]

Because Title II of the ADA largely mirrors the requirements of Section 504, requirements of both acts are often jointly referred to as "Section 504/ADA."[35] For public schools, then, additional ADA requirements often relate to construction and renovation requirements associated with physical accessibility.

Individuals with Disabilities Education Act

The Individuals with Disabilities Education Act (IDEA) is without doubt the most prescriptive of the three acts with regards to the educational experience of children with disabilities. First enacted in 1975 under the title the Education for All Handicapped Children's Act (EAHCA),[36] Congress re-named the EAHCA the Individuals with Disabilities Education Act (IDEA) in 1990 at the same time it enacted the ADA. Unlike Section 504 and ADA, IDEA is a funding statute, rather than a civil rights statute.[37] It provides funds to assist states to meet the needs of students with disabilities whose disabilities "adversely affect educational performance."[38] This piece of child welfare legislation serves as a complement to Section 504. You might say that Section 504 is the "stick" (it punishes those who violate it), while IDEA is the "carrot" (it provides financial incentives for the appropriate delivery of special education[39] and related services[40]).

Therefore, a student with disabilities enjoys protection against discrimination under Section 504, but may not be disabled enough to qualify for services under IDEA. Those served under IDEA are a subset of those protected under Section 504. For example, children with temporary impairments do not qualify under IDEA. In addition, a child could have an impairment (e.g., a hearing impairment, a learning disability) that is not severe enough to "adversely affect educational performance" as defined under the regulations to qualify for services under IDEA.[41] However, that child may still be entitled to accommodations under Section 504 in order to receive an education comparable to students who are not disabled.[42]

The IDEA is an extremely detailed law that requires school districts to document and justify the services provided to eligible children with disabilities. IDEA creates a federal statutory right or an entitlement for each student with a disability. That entitlement is a free appropriate public education (FAPE) that consists of special education and related services designed to address the unique needs of the individual child.[43] The law creates an affirmative obligation on the part of the State and its local school districts to identify and serve all eligible students with disabilities within their geographic boundaries.[44] This obligation to find children with disabilities also extends to those children whose parents have chosen to enroll them in private or home schools.[45] Students may be referred for evaluation by any school personnel or by parents. Once referred, the school district must review the child's records and design a series of assessments in order to determine whether the suspicions of a disability are founded.[46] Parents must be provided notice of their rights under the law and must consent in writing to any evaluation before any testing may commence.[47] Once the evaluation is complete, the school personnel meet with the parents as an "IEP team" to determine eligibility together. [48] To be eligible, the student's profile of needs and abilities must match the definition of one or more disability categories specified by the IDEA.[49] These disability categories are: "mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, and specific learning disabilities."[50] As mentioned before, the mere presence of a disability does not qualify a child for services under IDEA.[51] Rather, eligibility is dependent on whether the disability adversely affects educational performance, the degree to which may be further specified in the state's plan of service.[52]

Once eligibility is determined, the IEP team (which includes the parents) collaborates to produce an individualized education program (IEP).[53] The IEP is a document that delineates measurable annual goals and objectives for the child and specifies the kind and nature of services to be provided to or on behalf of the child.[54] As such, the IEP is the document by which free appropriate public education (FAPE) is defined for an individual child. Note that FAPE does not have a unitary definition under the law. That is, what is FAPE for one child may not be for another. A child's unique needs dictate the goals, objectives, and services defined by the IEP. This fact reveals a foundational characteristic of the IDEA. All decisions must be made on individualized determinations of need, as opposed to considerations of group instruction or programmatic design.

In 1982, the Supreme Court provided further explanation of FAPE and what it requires. The Court explained that FAPE does not require that a child's potential be maximized, but rather that the IEP be "reasonably calculated to enable the child to receive educational benefits."[55] FAPE is a "floor of opportunity," a minimum level of service below which a district may not go.[56]

Once the IEP Team determines the child's IEP goals and objectives,[57] the team must determine the issue of placement.[58] IDEA[59] requires that children with disabilities be educated in the "least restrictive environment" (LRE), another central principle of IDEA. LRE requires that children be educated with their nondisabled peers to the "maximum extent appropriate."[60] The 1997 Amendments to the IDEA re-asserted this principle and created a strong presumption in favor of educating children with disabilities in traditional classroom settings.[61] That is, the IEP team must first consider how the child's needs can be met in the regular class environment. This consideration must include a discussion of the curricular adaptations and supports, supplemental aids and services that may make it possible to deliver the child's IEP in the general classroom.[62] However, even given that strong presumption of regular class placement with support, the LRE for some students will require placement in other than the regular classroom for part or all of the school day. It is incumbent upon school personnel to show why, given the "nature and severity of the [child's] disability,"[63] FAPE cannot be achieved in the regular class setting for part or all of the child's school day. To that end, the law requires that school districts make available a "continuum of alternative placements" (e.g., resource rooms, special classes, special schools),[64] but that these other placements only be used when equity demands such a difference.

If a child's poor performance in the regular class motivates the IEP team to re-examine the appropriateness of a placement, it is helpful to note that the provisions of IDEA essentially offer two explanations for such a problem: either 1) the child is inadequately supported in the traditional classroom; or 2) the child is inappropriately placed in that setting. The law requires that the IEP team carefully examine the first question before considering the second.

Although the Supreme Court has never further defined the concept of LRE, numerous other courts have.[65] One of those cases, *Sacramento City Unified School District v. Rachel H.*,[66] established four factors to consider when determining LRE. Understanding these factors helps teachers understand what questions to ask and what information to gather if school personnel believe a child with disabilities is not making it in a particular setting. Those factors are: 1) "the educational benefits available to [the child] in a regular classroom, supplemented with appropriate aids and services as compared with the educational benefits of a special education classroom;"[67] 2) "the non-academic benefits of interaction with children who are not disabled;"[68] 3) "the effect of [the child's] presence on the teacher and the other children in the classroom;"[69] and 4) "the cost of mainstreaming [the child] in the regular classroom."[70]

It is also important for all staff to comprehend that LRE is related to, but is not synonymous with inclusion. Inclusion is an educational philosophy defined as "providing all students within the mainstream appropriate educational programs which are challenging and yet geared to their capabilities and needs as well as any support and assistance they and/or their teachers may need to be successful in the mainstream."[71] Some even argue that all students with disabilities should be included at all times regardless of the nature and severity of their disabilities. This stance, often referred to as "full inclusion," is inconsistent with IDEA. IDEA does not require that students with disabilities be included as much as possible. It requires that students with disabilities be included as much as appropriate.[72] IDEA is predicated on the principle that sometimes appropriateness (read equity) requires something other than what is traditional to meet the unique needs of an individual child. However, it is certainly true that for most students with disabilities an individualized examination of the needs of the child and the appropriate settings to address those needs will result in an included placement for all or part of the school day.

The final core component of IDEA is procedural protections. In order to protect the child's entitlement and to ensure that all decision-making occurs in the proper context, IDEA mandates detailed procedural requirements and safeguards. If parents believe that the school is not providing at least an appropriate education for their child, they can challenge the district through a due process hearing.[73] This hearing is presided over by an impartial hearing officer supplied by the state. The hearing officer makes findings of fact and then applies the law to the facts of the situation.[74] Parents may challenge any decision relative to the process (e.g., evaluation, eligibility, appropriateness, placement). Likewise, if the district believes that parents are obstructing the school's ability to meet its obligation of FAPE for the child, the district can request a due process hearing to settle the dispute.[75] Hearing decisions may be appealed in federal district court.[76] Provisions added in 1997 also require school districts to make available mediation as a mechanism for resolving any dispute with parents and avoiding the more adversarial hearing process.[77]

Another major addition to the law in 1997 included the creation of provisions detailing procedural safeguards for children with disabilities facing disciplinary sanctions.[78] These new provisions essentially codify earlier case law and require disciplinarians to ensure that children with disabilities are treated equitably by the process.[79]

Finally, case law has established that parents who prevail at the hearing or in court may be entitled to remedies under the court's broad authority to fashion "such relief as the court determines is appropriate."[80] These remedies include recovery of attorneys fees,[81] reimbursement of costs, including tuition costs borne by the parent,[82] and compensatory education.[83]

Recommendations for Practice

This chapter has provided an overview of federal disability law as it applies to public schools today. Subsequent chapters will further elaborate on these themes. Considering the issues related to this topic, the principal would do well to consider the following recommendations for practice:

- Develop a full understanding of federal disability law and its application to schools.
- Develop a firm grasp of state laws and regulations that complement these federal laws. Particular attention should be paid to provisions that heighten the standard or requirements set by federal law.
- Fully examine local policies and procedures that have been created to fulfill the obligations created by these laws.
- Periodically review local policies to be certain they are current and reflect accurately the federal and state laws upon which they are founded.
- Determine who can serve as part of the network of support within the school, the district, and the community to help all staff understand these laws and to help keep abreast of changes in the law.
- Provide staff development opportunities so that all staff members understand their responsibilities under the law.
- Cultivate relationships with disability advocacy groups in the area, particularly parent groups. Doing so allows the district to establish the kind of cooperative relationships envisioned between parents and school personnel in the IDEA.
- Find a mechanism for remaining current with the developments in this rapidly evolving area of school law. There are numerous commercial newsletters that serve this function. In addition, school districts may utilize a law firm that provides such updates on either a regular or as needed basis. Be sure to

be on the routing list for any such publications received by the district.

References

[1] This chapter builds, in part, on sections of J. MEAD, *The Legal Foundations of Equity: Protecting Access to Education.* Chapter 8 in FOUNDATIONS OF DEMOCRATIC EDUCATION, M. J. O'Hair, J. McLaughlin, & U. C. Reitzug. Belmont, CA: Wadsworth/Thomson Learning (2000).

[2] 29 U.S.C. 794: 34 C.F.R. § 104 *et seq*.

[3] 20 U.S.C. 1400 et seq.; 34 C.F.R. § 300 *et seq.*

[4] 42 U.S.C. § 12101 *et seq*.

[5] 29 U.S.C. § 794.

[6] 34 C.F.R. § 104.3(j)(1)(i).

[7] 34 C.F.R. § 104.3(k)(2).

[8] 34 C.F.R. § 104.3(j)(2)(ii).

[9] *See, e.g.,* Davis (CA) Joint Unified Sch. Dist. 31 IDELR 186 (OCR 1999).

[10] *See, e.g*, Martinez v. Hillsborough County Sch. Bd. 861 F.2d. 1502 (11th Cir. 1988). (The court found AIDS to be a disability within the definition of a disability in Section 504 because AIDS is a physical impairment that substantially limits a major life activity.)

[11] Chapter 13 provides a detailed discussion of the legal issues associated with infectious diseases including students and school personnel with infectious diseases in schools.

[12] 34 C.F.R. § 104(j)(2)(ii) (Section 504 provides coverage for persons with "a record of such an impairment" meaning the person "has a history of or has been misclassified as having" a disability. This would include a student who in the past fell within the category of severe learning disability, but no longer possesses the necessary deviation discrepancy to qualify under the IDEA but would fall under Section 504. (D. S. HUEFNER, GETTING COMFORTABLE WITH SPECIAL EDUCATION LAW: A FRAMEWORK FOR WORKING WITH CHILDREN WITH DISABILITIES, 41 (2000)). 34 C.F.R. § 104(j)(2)(iv); (Section 504 also extends its coverage to a person who "is regarded as having an impairment" such as a person with HIV, whose condition could be perceived to interfere with their education, when it does not.)

[13] 34 C.F.R. § 104.34(a).

[14] 34 C.F.R. § 104.32(b).

[15] 34 C.F.R. § 104.35(c).

[16] S. GORM, WHAT DO I DO WHEN…THE ANSWER BOOK ON SECTION 504, 3:29 (2000).

[17] 34 C.F.R. § 104.3.

[18] 34 C.F.R. § 104.11(a)(1).

[19] 34 C.F.R. § 104.12(a).

[20] Southeastern Community College v. Davis, 442 U.S.397 (1970).

[21] Rothschild v. Grottenthaler, 907 F.2d. 286 (2d Cir. 1990).

[22] United States Constitution, Article 1, Section 8, Clause 3 ("Congress shall have Power…to regulate Commerce with foreign Nation, and among the several States….").

[23] Public Law § 103-336.

[24] 42 U.S.C. § 12111.

[25] 42 U.S.C. §12112(a).

[26] 42.U.S.C. § 12132.

[27] 42 U.S.C. § 12181.

[28] 47 U.S.C. § 225 *et. seq.*

[29] 42 U.S.C. § 12201.

[30] 42 U.S.C. §12202.

[31] 42 U.S.C. §12209.

[32] 42 U.S.C. §12210.

[33] 42 U.S.C. §12208.

[34] 42 U.S.C. §12211 (conditions enumerated under paragraph (b) of this section include, among others, pedophilia, exhibitionism, voyeurism, compulsive gambling, kleptomania, and pyromania).

[35] *See, e.g,* Council of Administrators of Special Education, Inc., SECTION 504 AND THE ADA PROMOTING STUDENT ACCESS: A RESOURCE GUIDE FOR EDUCATORS (2nd Ed. 1999); P. ZIRKEL & J. KINCAID, SECTION 504, THE ADA AND THE SCHOOLS, Horsham, PA: LRP Publications (1995).

[36] Public Law 94-142.

[37] 20 U.S.C. §1400 (d)(1).

[38] 34 C.F.R. § 300.7(c).

[39] 20 U.S.C. § 1401(25). The term special education means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including— 1) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and 2) instruction in physical education.

[40] 20 U.S.C. § 1401(22). The term related services means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social

work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

[41] 34 C.F.R. § 300.7(c).

[42] Chapter 8 provides a number of examples of this phenomenon.

[43] 20 U.S.C. § 1401(8).

[44] 20 U.S.C. § 1412(a)(3). The law uses the terms state education agency (SEA) and local education agency (LEA) (20 U.S.C. § 1401). It should be noted that independent charter schools are considered LEAs under the IDEA and must ensure compliance in the same manner a school district would (20 U.S.C. § 1401(15); 34 C.F.R. § 300.312); *See also*, J. P. HEUBERT, *Schools without Rules? Charter Schools, Federal Disability Law, and The Paradoxes of Deregulation,* 32 HARV. C.R.-C.L. L. REV. 301 (Summer 1997). For the purposes of this chapter the term school district should be read to include all types of LEAs including independent charter schools. This obligation to find children with disabilities also extends to those children

[45] 20 U.S.C. § 1412 (a)(3)(A); 34 C.F.R. § 300.451. The rights afforded children enrolled by their parents in private settings are not coextensive with those of children in the public setting. These students enjoy only a group entitlement as opposed to an individual one and must be served "consistent with [their] number and location" (20 U.S.C. § 1412 (a)(10)(A); 34 C.F.R. § 300.452). In addition, IDEA now only requires LEAs to expend federal dollars on those children in private schools and makes no requirements for the expenditure of state or local funds (20 U.S.C. §1412 (a)(10)(A)(i); 34 C.F.R. § 300.453). Of course, states may impose additional requirements through state statutes

[46] 20 U.S.C. § 1414(b)(2).

[47] 20 U.S.C. § 1414(a)(1)(C).

[48] IEP refers to the Individualized Education Program (20 U.S.C. § 1401(11)). The law specifies that the IEP Team must include at a minimum: "(i) the parents of a child with a disability; (ii) at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment); (iii) at least one special education teacher, or where appropriate, at least one special education provider of such child; (iv) a representative of the local educational agency

who—(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general curriculum; and (III) is knowledgeable about the availability of resources of the local educational agency; (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi); (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (vii) whenever appropriate, the child with a disability" (20 U.S.C § 1414(d)(1)(B); 34 C.F.R. § 300.344(a)). Note that all decisions under IDEA must occur in a context of group decision-making including an opportunity for full parental participation in all determinations.

[49] 20 U.S.C. § 1401(3); 34 C.F.R. § 300.7.

[50] 20 U.S.C. § 1401(3).

[51] Although mere presence of a disability does qualify a child for protection from discrimination and an education comparable to that of non-disabled peers under Section 504.

[52] 34 C.F.R. § 300.126.

[53] 20 U.S.C. § 1414(d).

[54] The IEP should also specify any curricular adaptations, supports, supplementary aids and services (20 U.S.C. § 1414 (d)(1)(A); 34 C.F.R. § 300.347).

[55] Board of Education of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 177 (1982). However, state law may place a requirements for a higher level of service on its LEAs.

[56] *Id.*, at 200 (internal citations omitted).

[57] Chapter 11 examines the IEP process in depth including the requirement for who must be on an IEP team and the content required of each IEP. (20 U.S.C. § 1414(d)(1)(A)(vii); 34 C.F.R. § 300.347 (b)).

[58] 20 U.S.C. § 1414 (f); 34 C.F.R. § 300.130.

[59] And Section 504/ADA, for that matter.

[60] 20 U.S.C. § 1412 (a)(5).

[61] Senate Committee Report on P.L. 105-17, p. 26. *See also*, J. MEAD, *Expressions of Congressional Intent: Examining the 1997 Amendments to the IDEA*, 127 EDUC. L. REP. (West) 511 (Sept. 17, 1998).

[62] 20 U.S.C. § 1414(d)(1)(A)(iii); 34 C.F.R. § 347(a)(3).

[63] 20 U.S.C. § 1412(a)(5).

[64] 34 C.F.R. § 300. 551.

[65] *See, e.g.*, Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989); Roland M. v. Concord Comm., 910 F.2d 983 (1st Cir. 1990); Oberti v. Board of Educ. of the Borough of Clementon Sch. Dist., 995 F.2d 1204 (3d Cir. 1993); Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994).

[66] *Id.*

[67] *Id.* The following questions might be asked to consider this first factor: What academic progress (as measured by the IEP) is the child showing? What problems are apparent? What instructional strategies have been tried? To what effect? What curricular adaptations have been tried? To what effect? What supplemental and supportive services does the child receive now? Why isn't this enough? What is working and what is not? What other supplemental and supportive services are needed to help this child? What additional support and/or training do I need? How could I make this a successful environment for this child?

[68] *Id.* The following questions might be asked to consider the second factor: What socialization benefit does the child receive? Does the child appear to model his/her behavior on that of classmates? What evidence do you have? Does the child interact with classmates? In what ways? Are there differences in the way the child interacts with people in this setting compared with the ways s/he interacts in other settings you've observed (lunch room, recess, etc.)?

[69] *Id.* The following questions might be asked to consider the third factor: How much class time is used by the classroom teacher to work specifically with this child on academic skills? Is the child disruptive? In what ways? How much class time is expended getting the child's behavior under control? How do classmates respond to this child? Has anyone complained? Has there been any feedback from parents of other children?

[70] *Id.* This factor is a consideration for the administrative team of a school. Although it is important to note that cost alone, cannot rule out a setting or a service. The court's use of this factor suggests there is a limit (although undefined) to the measures required by a district to make a regular classroom placement available to the child. However, a recent Supreme Court ruling on related services calls into question the legitimacy of this factor. Can cost be considered at all? The honest answer at this time is—maybe.

[71] W. STAINBACK and S. STAINBACK, SUPPORT NETWORKS FOR INCLUSIVE SCHOOLING, p. 3. Baltimore, MD: Paul H. Brookes Publishing Company (1990).

[72] 20 U.S.C. § 1412(a)(5).

[73] 20 U.S.C. § 1415(f).

[74] 20 U.S.C. § 1415(h).

[75] In fact, some courts have read the law's affirmative obligation to provide FAPE as requiring districts to file complaints against parents when it is believed that the child is being denied his/her entitlement due to parental objections (*See e.g.*, Hacienda La Puente Unified Sch. Dist. v. Honig, 976 F.2d 487 (9th Cir. 1992)).

[76] 20 U.S.C. § 1415(i).

[77] 20 U.S.C. § 1415(e).

[78] 20 U.S.C. § 1415(k).

[79] *See also*, MEAD, note 61 at 524. "Essentially these provisions, like the judicial interpretations from which they stem, demonstrate that when school officials consider the discipline of students with disabilities they must ask three critical questions to ensure that the disciplinary sanction does not result in discrimination on the basis of disability and to ensure equity: 1) Is the behavior a manifestation of the disability? 2) Does the disciplinary consequence result in a change of placement thereby invoking the procedures of IDEA? and 3) Was the child receiving an appropriate programming [sic] at the time the misbehavior occurred?"

[80] 20 U.S.C. § 1415(i)(2)(B).

[81] 20 U.S.C. § 1415 (i)(3).

[82] School Committee of Town of Burlington v. Department of Educ. of Mass., 471 U.S. 359, 105 S. Ct. 1996 (1985); Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993).

[83] *See, e.g.,* Meiner v. Missouri, 800 F.2d 749 (8th Cir. 1986); Jefferson County Bd. of Ed. v. Breen, 853 F.2d 853 (11th Cir. 1988); Lester H. v. Gilhool, 916 F.2d 865 (3rd Cir. 1990); Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489 (9th Cir. 1994).

9

Section 504 of the Rehabilitation Act

Allan G. Osborne, Jr.

Introduction

Section 504 of the Rehabilitation Act of 1973, as amended, provides that "[n]o otherwise qualified individual with a disability…shall, solely by reason of her or his disability be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance…."[1] Section 504 effectively prohibits any recipient of federal funds from discriminating against individuals with disabilities in the provision of services or employment. Section 504 applies to any agency that receives federal funds; thus, it applies to all public schools and many private schools.[2] An individual is considered to have a disability under Section 504 if the individual has a physical or mental impairment that substantially limits one or more of the person's major life activities, has a record of such an impairment, or is regarded as having such an impairment.[3] Major life activities are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[4] The Supreme Court has held that a person is otherwise qualified for purposes of Section 504 if the person is capable of meeting all of a program's requirements in spite of the disability.[5] If a person is otherwise qualified, a recipient of federal funds is expected to make reasonable accommodations for the person's disabilities unless doing so would create an undue hardship.[6]

Students with disabilities at the elementary and secondary level are protected by and have rights under Section 504 as well as the Individuals with Disabilities Education Act (IDEA).[7] Any student covered by the IDEA would also be covered under Section 504; however, the reverse is not always true. Many students who are not eligible under the IDEA are still entitled to the antidiscrimination protections of Section 504. For example, a student with a physical disability who does not require special education and related services would not be entitled to the provisions of the IDEA but would be entitled to accommodations under Section 504.

Under Section 504 schools may not discriminate against parents who are disabled. Thus, schools must provide accommodations to disabled parents to allow them to participate in activities that are essential to the education of their children. For example, schools must provide reasonable accommodations to allow a disabled parent to participate in a parent-teacher conference.

School employees are entitled to the protections of Section 504. An employer is required to provide reasonable accommodations to an otherwise qualified disabled employee. However, as will be seen in this chapter, there are limits as to how far an employer must go to provide reasonable accommodations.

Legal Issues

Students

As stated above, students with disabilities are entitled to the protections of Section 504 as well as the IDEA. Generally speaking, compliance with the IDEA will translate into compliance with Section 504. A student is entitled to a free appropriate public education (FAPE) under both statutes. Thus, if a school district provides a FAPE under the provisions of the IDEA, the school district has also met its obligations under Section 504.[8] When a disabled student is not entitled to services under the IDEA the school district may still be required to provide educational services so that the student's needs will be met as adequately as the needs of nondisabled students.[9]

A school district cannot exclude a student from any of its programs simply because the student has a disability. Courts have held, for example, that schools cannot exclude a student who has AIDS when there is no evidence that the student poses a health risk to his classmates or teachers.[10] Similarly, schools may not exclude students who have other health impairments.[11] Schools also may not exclude students who have other disabilities such as mental retardation,[12] learning disabilities,[13] or attention deficit hyperactivity disorder (ADHD).[14] Public schools may not exclude disabled students for behavior that is a manifestation of their disabilities; however, disruptive or dangerous students may be moved to more restrictive environments.[15]

Schools officials must provide reasonable accommodations so that students with disabilities may access the school's programs. This accommodation may involve alterations to the physical plant, such as building wheelchair ramps or removing architectural barriers so that students may physically enter and get around the school building.[16] School officials must also allow students to bring service dogs into the classroom.[17] However, school districts are not required to provide accommodations that go beyond what would be considered to be reasonable. For example, accommodations that are excessively expensive, expose the school's staff to excessive risk, or that require a school to substantially modify the mission or purpose of a program would not be required.[18] In this respect, school districts are not necessarily required to make alterations to or provide accommodations in the student's home school. School districts may enroll a disabled student in another school that is accessible or that has the appropriate accommodations available. In the interests of economy, school districts may centralize programs rather than offer duplicative programs in each of its schools.[19] However, school districts must provide disabled students with facilities that are comparable to those provided to nondisabled students.[20]

One of the most common accommodations provided involves the provision of various school health services. Under Section 504, schools are required to provide disabled students with basic health services such as catheterization[21] and administration of medication. However, a school nurse is not required to administer medication if the prescription exceeds the normal recommended dosage.[22]

Recently, many questions have arisen regarding the participation of students with disabilities in extracurricular or athletic programs. Some students, due to their disabilities, do not meet the usual requirements for participation. In many cases school districts and athletic associations are required to waive the normal requirements for participation unless doing so would fundamentally alter the program or impose an excessive burden on the agency. Thus, schools or athletic associations may be required to waive grade point average requirements but may not be required to waive age limitation[23] or eight semester rules.[24] This issue is very controversial, however, and the outcome of a lawsuit frequently depends on the particular circumstances. If a student transfers from one school to another in order to receive special education services, the school may be required to waive any rules requiring the student to sit out a period of time before being eligible for athletics.[25]

Just as students are entitled to accommodations so that they can participate in the school's academic program, they may also be entitled to accommodations to allow them to participate in the school's extracurricular programs. For example, one court held that a hearing impaired student was entitled to the services of a interpreter so that she could understand the directions of her basketball coach.[26]

Parents

School districts may also be required to provide reasonable accommodations so that parents who have disabilities may participate in activities essential to their child's education. One court held that a school must provide a sign-language interpreter so that parents who were hearing impaired could participate in school-initiated conferences incident to the academic and disciplinary aspects of their child's educational program.[27] Under this ruling, school districts would not be required to provide accommodations for other school functions in which the parents' participation is not necessary, such as school plays or even graduation ceremonies. The school would, however, be required to allow the parents to provide their own accommodations. For example, the school could not prevent the parents from bringing their own sign-language interpreter to a graduation ceremony.

Employees' Discrimination Claims

School districts may not refuse to hire an applicant who has a disability, or in any way discriminate against an employee with a disability, as long as the applicant or employee is otherwise qualified for the position. An employer must, however, provide reasonable accommodations that will allow the employee or prospective employee to perform the job in question. Generally, in order to maintain a discrimination claim under Section 504, an employee must show that he or she was treated differently than non-disabled employees or that an adverse employment decision was made because of the individual's disability. For example, a disabled part-time worker could not maintain a discrimination claim when he was laid off after he had worked the maximum number of hours allowed for part-time workers when nondisabled part-time employees were laid off for the same reason.[28]

In another lawsuit, a former high school principal, who was a recovering alcoholic, was unable to show that a school district discriminated against him when it abolished his position and did not appoint him to the newly created position of combined elementary and high school principal.[29] For economic reasons the school district had combined the two positions but offered the new position to the former elementary principal because he was certified for grades kindergarten through twelve whereas the former high school principal was not. Employees with disabilities cannot maintain a discrimination claim if they do not have the skills to perform the job in question even when provided with accommodations. Courts will not uphold a discrimination claim if the school district can show that an adverse employment decision was made for nondiscriminatory reasons. For example, one court held that a disabled employee was not discriminated against when the employer was able to show that the employee was not promoted because his work performance was not up to standards and his work had not improved when he was provided with accommodations.[30]

An employee also cannot maintain a discrimination claim if the employee's alleged disability is not covered by Section 504. One court held that the term, "individual with disabilities" does not include an individual with sexual behavior disorders.[31] In that case, an instructor had been fired for violating the school's sexual harassment policy but alleged that he was wrongfully terminated because he had a sexual addiction that was a mental disability under Section 504. Similarly, another court held that a professor who had suffered a stroke was not discriminated against when he received smaller salary raises than other faculty members.[32] First, the court held that the professor was not disabled as defined by Section 504 since his stroke had not substantially limited a major life activity.[33] Secondly, the court found that the reasons the professor's salary raise was not comparable to other professors was related to his overall performance.

Employers are permitted to take appropriate disciplinary action against an employee who commits egregious or criminal misconduct, regardless of whether the employee is disabled. The Sixth Circuit upheld the termination of a coach who had been arrested for driving under the influence of alcohol and public intoxication.[34] The court held that the employer could hold an alcoholic employee to the same performance and behavior standards as other employees even if the unsatisfactory performance was due to the employee's alcoholism. Similarly, employees can be terminated for excessive absenteeism even if the absences are related to the disability because being present is considered to be an essential requirement of any job.[35]

Otherwise Qualified Individual

The Supreme Court has indicated that an individual with a disability is otherwise qualified if that person can perform all essential requirements of the position in question in spite of the disability.[36] Thus, if the individual cannot perform essential functions of the position, even with reasonable accommodations, the individual is not otherwise qualified. An essential requirement of most positions, especially those in school systems, is regular attendance. An employee who is unable to attend the workplace in a reliable and predictable manner is not otherwise qualified.[37] Section 504 does not protect excessive absenteeism, even when it is caused by a disability.[38] Similarly, a classroom teacher is expected to be able to be physically present in a classroom and to be able to interact with students. A teacher, who due to a disability is unable to interact with students, may not be entitled to an assignment that does not involve sustained contact with large groups of students. Classroom teaching would generally be considered an essential function of a teacher's job and an inability to teach in a classroom may mean that the individual could not meet all requirements of a teaching position in spite of his or her disability. However, if non-classroom positions are available, the teacher may be entitled to a reassignment to one of those positions.[39]

Failure to meet teacher certification requirements may disqualify an individual even if the failure is allegedly due to a disability. A teacher who claimed to be learning disabled but had not passed the communications portion of the National Teachers Examination after numerous attempts was not considered to be otherwise qualified for teacher certification.[40] The court found that the skills measured by the communications portion of the examination were necessary for competent performance as a classroom teacher. Thus, the court found that the teacher was not otherwise qualified because she could not perform the essential functions of the position.

Similarly, an employer can expect an individual to be able to perform his or her duties in a safe manner. For example, bus drivers who were poorly controlled diabetics were determined to be not otherwise qualified since they posed an unpredictable risk of developing hypoglycemia or the complications of hypoglycemia.[41] The complications included a sudden loss of vision or consciousness. On the other hand, if the diabetes could be controlled and the bus driver's fitness to operate the vehicle easily monitored, the driver could be considered otherwise qualified.[42] The same would be true for drivers who had other medical conditions such as a seizure disorder[43] or a heart condition. The employee in question must be individually assessed for fitness to perform the job in question. Before refusing to hire a disabled individual due to perceived risk, an employer must determine 1) the nature, duration, and severity of the risk, 2) the probability that the potential injury will actually occur, and 3) the possibility that reasonable modifications of policies, practices, or procedures will mitigate the risk.[44]

Section 504 also does not protect misconduct, even when it can be attributed to a disability. One court upheld the dismissal of an alcoholic employee who had repeatedly reported to work intoxicated and unable to perform his duties.[45] The court found that the employee was dismissed because of his misconduct, not his alcoholism, and that relief was not available under Section 504 for misconduct. Similarly, another court upheld the dismissal of a teacher who had been arrested and charged with possession of cocaine.[46] The court declared that his criminal conduct undermined his ability to work as a teacher.

Reasonable Accommodations

Under Section 504 an employer must provide reasonable accommodations so that an otherwise qualified employee with disabilities can work and compete with his or her nondisabled colleagues.[47] The purpose of providing an accommodation is so that the disabled employee can lead a normal life.[48] Accommodations may include alterations to the physical environment, adjustments to an employee's schedule, or minor changes in the employee's job responsibilities. What is, and is not, a reasonable accommodation has been the subject of much litigation.

An employer is not required to supply an accommodation if doing so would place an undue burden on the employer. Minor accommodations, however, are generally not held to be excessively burdensome. For example, one court held that monitoring a diabetic's ability to operate a school bus on a daily basis would not place an undue burden on the school district.[49] Generally, it is the school district's responsibility to show that requested accommodations would create an undue financial or administrative burden.[50]

An employer also is not required to make accommodations that would essentially change the nature of the position. However, an employer may be required to reassign a disabled employee to another position. This may be required when the employee is unable to perform the essential functions of his or her current job even with reasonable accommodations, and there exists, or soon will exist, a vacant position which the employee is able to perform.[51] In the case of classroom teachers, reassignment to a nonteaching position could be required if such positions existed in the district.[52] Reassignment is not required, however, when there is no other position available for which the employee is qualified.[53] An employer also is not required to create a new position or accommodate a disabled employee by eliminating essential aspects of his or her current position.[54]

As indicated in the previous section, regular attendance is considered to be an essential requirement of most jobs. An employer is not required to allow a disabled employee to work only when his or her conditions allows.[55] For example, one court held that a requested accommodation of being allowed to work when the employee's illness permitted would result in an undue hardship to the employer.[56]

Recommendations for Practice

- Students with disabilities may not be excluded from public schools or denied services simply because they are disabled.
- If a student with disabilities does not qualify for special education and related services under the IDEA, school officials should determine if the student requires reasonable accommodations under Section 504 to access the district's services and programs.
- School authorities should make an individualized determination regarding waivers of participation requirements for disabled student-athletes who may not meet usual requirements because of their disabilities.
- Accommodations must be provided to disabled parents so that they can participate in school functions essential to their child's education, such as parent-teacher conferences.
- To maintain a discrimination claim under Section 504 an employee must show that the disability is covered under Section 504, that an adverse employment decision was made because of the disability, and that the employee has the skills to perform the job in question.
- An employee is not otherwise qualified if that employee cannot perform the essential functions of the position even with reasonable accommodations.
- Employees must be individually assessed for fitness to perform the job in question.
- An employer is not required to provide an accommodation if doing so would create an undue financial or administrative burden.
- If an employee is no longer able to perform the essential functions of his or her job, the employer must transfer a disabled employee to another vacant position if one exists and the employee is qualified for the position; however, an employer is not required to create a new position for the disabled employee.

References

[1] 29 U.S.C. § 794.

[2] The Rehabilitation Act of 1973, Section 504 requires the condition of receipt of federal funds which contrasts with the Americans

with Disability Act of 1990 (ADA) covering all employees who work for companies with fifteen or more employees.

[3] 29 U.S.C. § 706(7)(B).

[4] 34 C.F.R. § 104.3(j)(2)(ii).

[5] School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987); Southeastern Commun. College v. Davis, 442 U.S. 397 (1979).

[6] 34 C.F.R. § 104.12(a).

[7] 20 U.S.C. § 1400 *et seq.*

[8] *See, e.g.*, Wenger v. Canastota Cent. Sch. Dist., 961 F. Supp. 416 (N.D.N.Y. 1997); McGraw v. Board of Educ. of Montgomery County, 952 F. Supp. 248 (D. Md. 1997); D. F. v. Western Sch. Corp., 921 F. Supp. 559 (S.D. Ind. 1996); Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990); Puffer v. Raynolds, 761 F. Supp. 838 (D. Mass. 1988).

[9] Lyons v. Smith, 829 F. Supp. 414 (D.D.C. 1993)

[10] Doe v. Dolton Elementary Sch. Dist. No. 148, 694 F. Supp. 440 (N.D. Ill. 1988); Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (C.D. Cal. 1987).

[11] Thomas v. Davidson Academy, 846 F. Supp. 611 (M.D. Tenn. 1994); Jeffrey S. v. State Bd. of Educ. of the State of Georgia, 896 F.2d 507 (11th Cir. 1990).

[12] Oberti v. Board of Educ. of the Borough of Clementon Sch. Dist., 801 F. Supp. 1393 (D.N.J. 1992), *aff'd* 995 F.2d 1204 (3d Cir. 1992).

[13] I.D. v. Westmoreland Sch. Dist., 788 F. Supp. 634 (D.N.H. 1992).

[14] *See, e.g.*, Bercovitch v. Baldwin Sch., 964 F. Supp. 597 (D.P.R. 1997).

[15] *See, e.g*, S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981); Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328 (W.D.N.Y. 1979).

[16] *See, e.g*, Begay v. Hodel, 730 F. Supp. 1001 (D. Ariz. 1990).

[17] Sullivan v. Vallejo City Unified Sch. Dist., 731 F. Supp. (E.D. Cal. 1990).

[18] Eva N. v. Brock, 741 F. Supp. 626 (E.D. Ky. 1990); Kohl v. Woodhaven Learning Center, 865 F.2d 930 (8th Cir. 1989).

[19] *See, e.g.*, Barnett v. Fairfax County Sch. Bd., 721 F. Supp. 757, *aff'd* 927 F.2d 146 (4th Cir. 1991).

[20] Hendricks v. Gilhool, 709 F. Supp. 1362 (E.D. Pa. 1989).

[21] Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984).

[22] DeBord v. Ferguson-Florissant Sch. Dist., 126 F.3d 1102 (8th Cir. 1997); Davis v. Francis Howell Sch. Dist., 104 F.3d 204 (8th Cir. 1997).

[23] M.H. v. Montana High Sch. Ass'n, 929 P.2d 239 (Mont. 1996); Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026

(6th Cir. 1995); Pottgen v. Missouri State High Sch. Activities Ass'n, 40 F.3d 926 (8th Cir. 1994). *But see,* Dennin v. Connecticut Interscholastic Athletic Conference, 913 F. Supp. 663 (D. Conn. 1996), *dismissed as moot* 94 F.3d 96 (2d Cir. 1996); Johnson v. Florida High Sch. Activities Ass'n, 899 F. Supp. 579, *vac'd and rem'd* with instructions to dismiss as moot, 102 F.3d 1172 (11th Cir. 1997); University Interscholastic League v. Buchanan, 848 S.W.2d 298 (Tex. Ct. App. 1993).

[24] McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453 (6th Cir. 1997); Rhodes v. Ohio High Sch. Athletic Ass'n, 939 F. Supp. 584 (N.D. Ohio 1996).

[25] Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 735 F. Supp. 753 (M.D. Tenn. 1990), *aff'd sub nom.* Metropolitan Gov't of Nashville and Davidson County v. Crocker, 908 F.2d 973 (6th Cir. 1990) (mem.).

[26] State of West Virginia *ex rel.* Lambert v. West Virginia State Bd. of Educ., 447 S.E.2d 901 (W. Va. Ct. App. 1994).

[27] Rothschild v. Grottenthaler, 725 F. Supp. 776 (S.D.N.Y. 1989), *aff'd in part, vac'd and rem'd in part* 907 F.2d 286 (2d Cir. 1990).

[28] Spella v. Cuyahoga Community College, 889 F. Supp. 1023 (N.D. Ohio 1994).

[29] Pierce v. Engle, 726 F. Supp. 1231 (D. Kan. 1989).

[30] Adrain v. Alexander, 792 F. Supp. 124 (D.D.C. 1992).

[31] Winston v. Maine Technical College Sys., 631 A.2d 70 (Me. 1993).

[32] Redlich v. Albany Law Sch. of Union Univ., 899 F. Supp. 100 (N.D.N.Y. 1995).

[33] *See also,* Harris v. Adams, 873 F.2d 929 (6th Cir. 1989) (where an applicant was unable to show that his asthma substantially limited a major life activity).

[34] Maddox v. University of Tennessee, 62 F.3d 843 (6th Cir. 1995).

[35] Walders v. Garrett, 785 F. Supp. 303 (E.D. Va. 1991); Linares v. City of White Plains, 773 F. Supp. 559 (S.D.N.Y. 1991).

[36] *See* School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987); Southeastern Community College v. Davis, 442 U.S. 397 (1979).

[37] Santiago v. Temple Univ., 739 F. Supp. 974 (E.D. Pa. 1990).

[38] Carr v. Reno, 23 F.3d 525 (D.C. Cir. 1994); Jackson v. Veterans Admin., 22 F.3d 277 (11th Cir. 1994); Linares v. City of White Plains, 773 F. Supp. 559 (S.D.N.Y. 1991).

[39] Mustafa v. Clark County Sch. Dist., 876 F. Supp. 1177 (D. Nev. 1995), *aff'd in part, rev'd in part and remanded* 157 F.3d 1169 (9th Cir. 1998).

[40] Pandazides v. Virginia Bd. of Educ., 804 F. Supp. 794 (E.D. Va. 1992), *rev'd on other grounds* 13 F.3d 823 (4th Cir. 1994).

[41] Wood v. Omaha Sch. Dist., 25 F.3d 667 (8th Cir. 1994).

[42] *See, e.g.*, Commonwealth of Pennsylvania v. Tinsley, 564 A.2d 286 (Pa. Commw. Ct. 1989).

[43] Commonwealth of Pennsylvania, Dep't of Transportation v. Chalfant, 565 A.2d 1252 (Pa. Commw. Ct. 1989).

[44] Bombrys v. City of Toledo, 849 F. Supp. 1210 (N.D. Ohio 1993).

[45] Gonzalez v. California State Personnel Bd., 39 Cal. Rptr.2d 282 (Cal. Ct. App. 1995).

[46] Gedney v. Board of Educ. of the Town of Groton, 703 A.2d 804 (Conn. Ct. App. 1997).

[47] Fink v. New York City Dep't of Personnel, 855 F. Supp. 69 (S.D.N.Y. 1994).

[48] McWright v. Alexander, 982 F.2d 222 (7th Cir. 1992).

[49] Commonwealth of Pennsylvania v. Tinsley, 564 A.2d 286 (Pa. Commw. Ct. 1989).

[50] Byrne v. Board of Educ., Sch. Dist. of West Allis - West Milwaukee, 741 F. Supp. 167 (E.D. Wis. 1990).

[51] Ransom v. State of Arizona Bd. of Regents, 983 F. Supp. 895 (D. Ariz. 1997).

[52] Mustafa v. Clark County Sch. Dist., 157 F.3d 1169 (9th Cir. 1998).

[53] Black v. Frank, 730 F. Supp. 1087 (S.D. Ala. 1990).

[54] Alexander v. Frank, 777 F. Supp. 516 (N.D. Tex. 1991).

[55] Huber v. Howard County, 849 F. Supp. 407 (D. Md. 1994).

[56] Walders v. Garrett, 765 F. Supp. 303 (E.D. Va. 1991).

10

Disciplining Students With Disabilities

Margaret Bannon Miller

Introduction

In June 1997, the long awaited reauthorization of the Individuals with Disabilities Act ("IDEA")[1] was passed by Congress. Although the reauthorization contained a number of amendments, the most eagerly awaited and controversial were the amendments dealing with the discipline of students with disabilities. In its previous incarnations, the IDEA had never mentioned the word discipline and application of the principles of the Act of disciplinary matters had been left to the courts and the Office of Special Education Programs (OSEP) of the United States Department of Education. In the 1997 reauthorization, Congress prescribed in considerable detail, the requirements that schools must follow in applying school rules and disciplinary measures to students with disabilities. Since the regulations implementing the reauthorized IDEA encompass the Act's requirements and provide some guidance toward implementation, the material which follows will be based primarily upon the regulations.[2]

Legal Issues

Discipline and the IEP

Even before the reauthorization, OSEP had issued a memorandum concerning discipline of students with disabilities, which recommended the incorporation of a behavioral plan into the IEPs of students who were experiencing behavioral difficulties that interfered with their ability to function appropriately in the school setting.[3] Such a plan is now a requirement at any time when a student with a disability is removed from his/her program for more than ten school days in the same school year. This would encompass a suspension for more than ten consecutive days, a series of shorter suspensions at the point they accumulate to more than ten days in a school year, removal of a student to an interim alternative educational setting for longer than ten school days or an expulsion.[4]

Even though the law only requires conducting a functional behavioral assessment and devising a behavioral plan for a student at these specific times, the law requires IEP teams to consider intervention for a child whose behavior impedes learning whether or not the child has been excluded and whether or not the child has a "behavior disability." It is a wise IEP team that at the annual meeting to review the student's placement explores how the student is doing behaviorally as well as academically. This kind of inquiry allows the student's IEP team to discover problem behaviors, and if necessary, conduct a functional behavioral assessment and formulate a behavioral plan. Such a practice may allow the school to deal with problem behaviors early enough to avoid frequent systematic steps which staff will use to deal with the student's behavior. This allows staff to implement a consistent approach, which is generally much more successful in modifying a student's behavior, and such planning can facilitate the deliberation necessary to determine whether a student's behavior is a manifestation of his/her disability.

Suspension in its Various Forms

The treatment of suspension in both the IDEA and the implementing regulations appears to be a continuation of the differentiation between suspension of less than ten school days and suspension of more than ten school days first made by the Office for Civil Rights (OCR) and adopted by the Supreme Court. In *Honig v. Doe* the Supreme Court defined "change of placement" as "a suspension in excess of ten (10) days."[5] A suspension of less than ten school days was not seen as a change in placement triggering procedural safeguards including the need for a manifestation determination.

That distinction is now a part of the IDEA regulations which defines a change of placement as removal of the student from the current educational placement for more than ten consecutive days or a series of removals which constitute a "pattern" exceeding ten school days in a school year due to the length of each removal, the total amount of time the student is removed and the proximity of the removals to one another.[6] If a suspension is for ten school days or less, the school need not provide a student with educational services unless the suspension, when combined with previous suspensions would take the student beyond ten cumulative suspension days in that school year. Further, a functional behavioral plan is not required as long as the student remains at the level of ten suspension days or less in a school year. Since a suspension of ten days or less is not a change in placement, neither a manifestation determination nor any of the other procedural safeguards in the Act are required. If the student is being suspended for ten school days or less, and has not previously been suspended during the school year so that the student's suspension days will not exceed the ten school day mark, the school need not provide services during the period of suspension nor is there a need for a behavioral plan, a manisfestation determination or other procedural safeguards.[7]

Although there was some confusion about multiple suspensions when the reauthorization was first passed, the regulations seem to allow school officials to impose additional suspensions, beyond ten cumulative school days in the same school year, for separate incidents of misconduct.[8] However, there is a caveat to this seeming flexibility. If the additional removals constitute a "pattern", they are transformed from an allowable suspension to a change in placement requiring procedural safeguards. As previously mentioned, the regulations contemplate that when certain factors converge (the total cumulative days exceeds 10, the length of each removal, and the close proximity of one removal to another) a change of placement has occurred.[9] Again, this approach is similar to the longstanding analysis of suspension done by the OCR. In determining whether a series of suspensions created a pattern amounting to a change of placement, the OCR used the same three factors which are now part of the IDEA regulations. As an example of a pattern of suspensions that would clearly amount to a significant change in placement, OCR described a student being suspended "several times during a school year for eight or nine days at a time."[10]

Unlike a single suspension of ten days or less, suspensions which are each less than ten days but amount cumulatively to more than ten days in a school year, do require a continuation of educational services. Under these circumstances, the student must be provided services which enable him/her to "appropriately progress in the general curriculum and appropriately advance toward achieving the goal set out in the IEP."[11] The extent to which these services are necessary during the period of suspension, beginning at the tenth cumulative day of suspension, is decided by school personnel in consultation with the student's special education teacher.[12]

Further, within ten business days of any removal which exceeds the ten cumulative school days in a school year, the student's IEP team must convene to first develop an assessment plan if one has not been completed. The team must reconvene to develop a behavioral plan.[13] If the development of the plan is a result of a series of suspensions, the plan should provide strategies calculated to lessen or eliminate those behaviors for which the suspensions were assigned. If the student has a behavioral plan prior to the suspension which takes him/her beyond the ten cumulative school days, the student's IEP team would convene within ten business days of that suspension to review the behavioral plan and make necessary changes.[14]

A Word About In-School Suspension

Whether in-school suspension is to be counted when figuring the number of days a student has been suspended from school has been the topic of much debate. In the analysis and comment which accompanied the publication of the IDEA Regulations, the U.S. Department of Education has said that in-school suspension would not be considered a part of the suspension days addressed in the regulations so long as the student is given the opportunity to: 1) continue to appropriately progress in the general curriculum;[15] 2) continue to receive the specific services in the student's IEP; and 3) continue to participate with non-disabled students to the extent that the student would in his/her current placement.[16] Although this approach allows schools greater flexibility in dealing with disciplinary problems, it may not be achievable given the current structure of some in-school suspension programs. In order to assure that the use of in-school suspension meets these three conditions, the IEP team may want to include in the student's behavioral plan a description of exactly what will happen when the student is placed in in-school suspension so as to guarantee that he/she is continuing to receive access to the general curriculum, is receiving the services in the IEP, and is with non-disabled children. For example, the behavioral plan could specify that when the student reports to the in-school suspension room (which will probably contain a good number of non-disabled students), the student's special education teacher will be notified so that the teacher will know where the student is located when it is time to provide certain services contained in the student's IEP. The plan should also indicate that the student will continue working on assignments from the various classes during the time he/she is in in-school suspension so as to be considered separately from suspensions which must be counted towards the ten cumulative, school days in a school year.

Whether the school must count suspension from the school bus as a day of suspension from school depends upon several factors. If transportation is listed in the student's IEP as a related service, meaning the school has deemed transportation necessary for the student's special education, a day of suspension from the bus would count as a day of suspension from school unless the school provided an alternate method of transportation. However, if transportation is not listed as a related service in the student's IEP, suspension from the bus would not be a suspension from school and the student's parents would have to find a way for the student to get to school.[17]

Pattern of Suspensions

Finally, if a series of suspensions of ten school days or less forms a pattern so as to amount to a change of placement, the school would need to follow the steps delineated below under "Expulsion:" i.e., develop a functional behavior assessment plan, conduct the assessment and formulate a behavioral plan, hold a manifestation determination conference to decide whether the student's disability caused the misbehavior(s) which brought about the suspensions, and provide notice to the student's parents of all other necessary procedural safeguards.[18] Because it may be impossible to determine the exact point at which a series of suspensions forms a pattern, school administrators would be wise to establish a schedule by which a student's IEP team would automatically reconvene once a certain number of suspension days is reached. For example, as the student is assigned a suspension of less than ten days, but one which will take him/her beyond the ten cumulative school days in a school year, the IEP team would meet to discuss the reason for the current and past suspensions and to look at the number of days the student has been suspended and the proximity of those days to each other. A meeting would have to be held in any event to formulate an assessment plan or to review an already existing behavioral plan. If the IEP team decides that existing suspensions do not form a pattern, it could okay the further use of suspensions up to a certain number, at which point the team would reconvene to again examine the behavioral plan and the nature, frequency and number of suspensions. Some kind of periodic review will be absolutely necessary in order to avoid suspensions becoming a change of placement without the procedural safeguards.

Use of 45-Day Interim Alternative Educational Setting

Presumably, a student's IEP team could fashion and move the student to an "interim alternative educational setting" (IAES) at any time school personnel and the student's parents agree that such a placement is appropriate. For example, if the school placement had become inappropriate and the IEP team, including the student's parents, agreed upon the need for residential placement; the team might choose to create an IAES to serve the student's needs while arrangements for the residential placement were being made. However, the IDEA and its implementing regulations address the use of IAES under only two circumstances: 1) when triggered by a student bringing a weapon to school[19] or knowingly possessing or using illegal drugs or soliciting the sale of a controlled substance at school or a school function; and 2) when ordered by an independent hearing officer upon a determination that the student is a danger to self or others.[20]

A student who brings a weapon to school may have his placement unilaterally changed to an IAES: i.e., the change can be ordered by the school without the consent of the parent. For purposes of the IDEA regulations, weapon has the same meaning as "dangerous weapon" in the United States Code: "A weapon, device, instrument, material or substance, animate or inanimate that is used for or is readily capable of causing death or serious bodily injury, except that such term does not include a pocket knife with a blade less than 2 1/2 inches long."[21] A school may also impose a unilateral move to an IAES for a student who knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance. The regulation defines controlled substance as "a drug or other substance identified under Schedules I, II, III, IV or V in Section 202(c) of the Controlled Substances Act." Illegal drug is also defined as a controlled substance that is "legally possessed or used under the supervision of a healthcare professional or under any provision of federal law."[22]

Even though a student may be ordered to an interim alternative educational setting by school officials, the setting itself must be determined by the student's IEP team.[23] The team must design the IAES so as to enable the student to continue to progress in the general curriculum and continue to receive the services and modifications that will enable him/her to meet the IEP goals. The plan for the IAES must also include services and modifications that address the student's behavior and are designed to prevent the behavior from recurring.[24] Presumably, unless the school has already created a pattern of suspensions which precludes its use of any further suspensions that school year, the student could be suspended for a few days to allow the IEP team to meet and design the IAES.

No later than the date on which the decision is made to place the student in the IAES, the school must provide the student's parents notification of this decision and a copy of the notice of procedural safeguards. Within ten business days of any removal which constitutes a change in the student's placement, including a change to an IAES, the school must convene the IEP team to develop an assessment plan, or if a functional behavioral assessment has been completed and a behavioral plan implemented, the behavioral plan must be reviewed and revised if necessary.[25] Within ten school days of the decision to move the student to an IAES, the IEP team must meet to conduct a manifestation determination review following the same set of procedures described in the "Expulsion" section below. If the student's behavior is not found to be a manifestation of his/her disability, the school may continue on with the normal expulsion procedure which it employs for students without disabilities unless the student's parent disagrees with the manifestation determination and asks for a due process hearing to decide the question. In the event of a hearing request, the student would stay in the IAES for the duration of the 45 calendar day period or until the independent hearing officer renders his decision, whichever occurs first.[26] Even if the student's behavior is judged to be a manifestation of his/her disability, the student may still remain in the IAES for the remainder of the 45 calendar day period before returning to the original placement or moving to another placement which the IEP team, including the student's parent, feels better meets the student's needs.

Another use of the IAES is as a temporary placement for students who are a danger to themselves or others. Although placing such a student in an alternative setting can be decided upon by agreement of the student's IEP team, including the student's parent, the procedures in the regulation address the situation in which the parties cannot agree and the decision is turned over to an independent hearing officer.[27] An IAES for a dangerous student cannot be unilaterally assigned by school officials without parent consent. Like any hearing about a 45-day IAES, this hearing is held on an expedited basis. In order to grant a school's request to place a dangerous student in an IAES, the independent hearing officer must: 1) determine that the school has demonstrated "beyond a preponderance of the evidence" that keeping the student in the current placement is substantially likely to result in injury to the student or others; 2) consider the appropriateness of the current placement; 3) consider whether the school has made reasonable efforts to reduce the risk of harm in the student's current placement (including the use of supplementary aids and services); and 4) determine that the IAES will enable the child to continue to progress in the general curriculum, receive the services and modifications in the student's IEP and meet the IEP goals.[28] It is interesting to note that the IAES which the school asks an independent hearing officer to impose in the case of a dangerous student may be, but need not be, the work of the IEP team. Instead, it may be something which the school proposes after consultation with the student's special education teacher, although the U.S. Department of Education encourages schools to develop the IAES through use of the IEP team.[29]

It is important for schools to remember that under *Honig v. Doe*, school officials still have the ability to go directly to court to seek injunctive relief in order to immediately remove a student who is dangerous to self or others.[30] Obtaining injunctive relief from the court precludes the necessity of obtaining the decision of an independent hearing officer, and unlike a hearing officer, a judge may choose to order an IAES of longer than 45 calendar days. It is reasonable to assume that a judge has the power to order a student out of the current placement and into an IAES for whatever period of time the judge deems appropriate, although this point is not discussed in either *Honig* or in the IDEA regulations.

Expulsions or Other Changes of Placement for Disciplinary Reasons

An expulsion or other change of placement for disciplinary purposes (including a pattern of suspensions) requires procedures in addition to the steps which must accompany suspensions beyond ten cumulative school days. For example, on the day an administrator decides to expel the student, he or she must supply the student's parent with notice of the decision as well as a notice of procedural safeguards.[31] Within ten business days of removing the student from his/her placement (it is unclear whether this includes any suspension days prior to the actual expulsion), the student's IEP team must meet to formulate a behavioral assessment plan or to review and, if necessary, revise an already existing behavioral plan. It is logical to ask: if we are preparing to expel the student, why are we developing a behavioral plan? The answer is because the development of a plan is a procedural requirement any time a student is removed from school for more than ten cumulative school days in a school year.[32] Even if a student is ultimately expelled, and the offense for which he/she is expelled is the only disciplinary infraction the student has committed, the IEP team can devise an activity for the expulsion period that is aimed at preventing the behavior in the future. For example, a student expelled for possession or being under the influence of drugs on school premises could receive drug education and/or counseling from a qualified member of the school staff during the period of expulsion. This is a fairly abbreviated behavioral plan, but it is one that is designed to attempt to prevent the behavior from recurring.

Under a requirement that is not in the IDEA regulations, but is a mandatory part of any change of placement under the regulations implementing Section 504,[33] a student must have a recent evaluation which yields information appropriate for the IEP team to use in making its manifestation determination. In a 1989 memorandum to senior staff, OCR describes the kind of information it believes necessary to make a manifestation determination: "the information considered would include psychological evaluation data related to behavior [and] the relevant data would be recent enough to afford an understanding of the child's current behavior."[34] Thus, a recent evaluation which yields relevant behavioral data would be necessary before proceeding to the manifestation determination review since every student eligible under the IDEA is also covered by Section 504.

Within ten school days after the decision to expel, the student's IEP team must conduct a review of the relationship between the student's disability and the misbehavior.[35] In conducting this manifestation determination, the IEP team must consider all relevant information in terms of the student's misbehavior. This information includes: 1) evaluation and diagnostic results, including relevant information supplied by the parent; 2) observations of the student; and 3) the student's IEP and placement.[36] Based upon that information, the IEP team makes a series of determinations: 1) that in relationship to the student's misbehavior, his/her IEP and placement were appropriate and the services, aids and behavior strategies were provided according to the student's IEP; 2) that the student's disability did not impair his/her ability to understand the impact and consequences of the behavior; and 3) that the student's disability did not impair his/her ability to control the behavior.[37]

If the student's IEP team determines that the student's disability directly caused the student to be unable to control the behavior or that the student's disability did not allow him/her to properly understand the impact and consequences of the behavior, the team must find that the behavior was a manifestation of the student's disability. Further, if the IEP or placement is found to be inappropriate in relation to the student's misbehavior, the expulsion or other disciplinary change of placement cannot proceed. This means that if a student is being expelled for continually cutting classes and the classes he/she cuts are ones in which supplementary aids, services, or modifications would have been necessary for his educational success but were not provided for in the IEP, the student cannot be expelled for his/her misbehavior. Likewise, if the student's IEP listed certain modifications for a particular class, and those modifications were not made, and if as a result, the student's behavior in that class deteriorated, the student cannot be expelled for his actions in that particular class. Such a result may seem to remove students' responsibility to come to class and act appropriately despite an inappropriate IEP. However, the school must first fulfill its obligations towards the student, and then it may hold the student responsible. Given a finding that the behavior is a manifestation of the student's disability, the IEP team must remedy deficiencies, if any, in the IEP and determine what measures are necessary to assist the student in changing the behavior.[38] This may include a change of placement if the IEP team determines that such a change is necessary. However, the parent must agree to the change or the school must move on to mediation or request a hearing to decide the matter.

Should the IEP team decide that the student's misbehavior is not a manifestation of the disability, the school must provide the parent with a notice of the decision including a notice of procedural safeguards and may proceed with expulsion or other disciplinary change of placement.[39] The school would then transmit the student's special education and disciplinary records to the person or persons making the final determination on the disciplinary action.[40] During a period of expulsion or other disciplinary change of placement, the student must continue to receive services as designed by the student's IEP team. In designing the services, the team must determine the extent to which they are necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward the goals in the student's IEP.[41]

If the student's parent wishes to challenge the manifestation determination, the parent may request a hearing which is to be held on an expedited basis.[42] In reviewing the IEP team's decision, the hearing officer must consider the same facts and make the same three determinations prescribed by the regulations for the IEP team. Until the hearing officer makes a final determination, and during any period which a state might provide for appeal of a hearing officer's decision; the student must stay in the educational placement he was in when the misbehavior occurred unless the school and the student's parent agree to a different placement, or unless the student has been unilaterally assigned to a 45-day IAES due to weapons or drugs.[43] Again, it should be noted that a student who is considered too dangerous to remain on school premises while the expulsion process and possibly a due process hearing are unfolding, can be removed through the injunctive process allowed by *Honig*. The length and complication of the procedures which surround expulsion or other disciplinary changes of placement should encourage administrators to adopt the periodic review of suspensions suggested in a previous section of this chapter, since a series of suspensions which form a pattern would invoke every single one of these procedures.

Application To Students Not Yet Eligible For Special Education

In any situation where the school can be determined to have knowledge of a student's disability prior to misbehavior that triggers expulsion, the student may receive all of the IDEA protections prior to the disciplinary action being carried out.[44] Knowledge of a student's disability is imputed to the school under any one of four circumstances: 1) the student's parent has expressed concern in writing to appropriate school personnel that the student is in need of special education and related services; or 2) the behavior or performance of the student mirrors the behavior or performance described in the definitions of the various disability categories and demonstrates the need for services; or 3) the student's parent has requested an evaluation and has followed formal evaluation procedures; or 4) the student's teacher or other school personnel have expressed concern about the student's behavior or performance to either the director of special education or other personnel in accordance with the school's "child find" or special education referral procedure.[45]

A mere expression of concern by a teacher, which is not related to whether the student has a disability, would not form a basis for knowledge that the student has a disability. Further, if an expression of concern about the student's behavioral performance is followed by responsible school action to address that behavior, the expression of concern does not amount to knowledge that the student has a disability.[46] Also, the school is not deemed to have knowledge if it has conducted a special education evaluation and determined that the student is not eligible or if the school determines that an evaluation is unnecessary and provides the student's parent with this determination and notice of procedural safeguards.[47]

Even if the school did not have prior knowledge of a student's disability, but during the period of an expulsion or other disciplinary change of placement, the student's parent requests an evaluation, that evaluation must be done on an expedited basis.[48] During the evaluation period, the student would be in an educational placement determined by school officials. This placement can include suspension or expulsion without educational services.[49] In other words, services need not be provided to an expelled or suspended student while the expedited evaluation is taking place. Should the evaluation show that the student is eligible for special education and related services, the IEP team would conduct a manifestation determination review. If the student's behavior is not a manifestation of his/her disability, the expulsion or other disciplinary change of placement could continue with services designed by the IEP team, including a behavioral plan.[50]

The possibility of imputing knowledge of a student's disability based upon the four circumstances delineated in the Act and regulation make it imperative that school administrators familiarize staff members with the special education "child find" and referral procedures of their local school district. In the past, many have thought that unless a student's behavior substantially interfered with educational progress, the behavior should not be looked upon as a possible sign of a need for special education services. The amendments added during the 1997 reauthorization, with its emphasis on behavior, makes such thinking outmoded. Expulsion of a student, even for egregious behavior, could be substantially delayed if it can be credibly contended that long term misbehavior served to put the school on notice that the student could be eligible for special education and related services.

Referral To Law Enforcement/Judicial Authorities

Because of a somewhat interesting court decision which held referral to a law enforcement agency had to be an IEP team decision if such a referral could result in a change of the student's placement,[51] there has been great concern among some administrators regarding their power to continue to refer students who engaged in criminal or delinquent conduct to the proper authorities. This has been especially troublesome where such referral is required by state law. The reauthorized IDEA makes it clear that the school retains the right to report a crime committed by a student with a disability to the same extent that such crimes are reported when committed by students without disabilities. Both law enforcement and judicial authorities may exercise their responsibilities under federal or state law when a crime is committed by a student with a disability.[52]

When a referral to law enforcement or the courts is made by the school, copies of the student's special education and disciplinary records are to be transmitted for consideration by the authorities to whom the crime is reported. However, such a transmission can only take place if it meets the requirements of the Family Educational Rights and Privacy Act (FERPA).[53] In order to release any personally identifiable information, the school must receive consent from the student's parent, or release the information in response to a judicial order or lawfully issued subpoena, or release the information because there exists a health or safety emergency.[54] In the absence of parent permission, the school would be unable to transmit the student's disciplinary and special education records to a law enforcement agency or court unless the school received a court order or subpoena to do so or unless the situation fulfilled the requirements of a health or safety emergency as described in the FERPA regulations. However, the fact that the records cannot be transferred, does not prevent the school district from reporting the crime.

Recommendations for Practice

Suspension

- Under a suspension,[55] no services, including a behavioral assessment or behavioral plan, are required unless the student has already been suspended for ten cumulative days in that school year, repeated suspensions constitute a change in placement, or behavior is determined to impede learning.
- When repeated suspensions total ten days or less, services must be provided to the extent necessary for the student to progress in the general curriculum and appropriately advance toward achieving his/her IEP goals. The extent of necessary services is determined by school personnel in consultation with the student's special education teacher.
- When suspensions exceed ten cumulative days in a school year, the IEP team must convene within ten business days to develop an assessment plan. Following the completion of the assessment, the IEP team must convene to develop a behavioral plan. If the student has a behavior plan, the IEP team must convene within ten business days of removal to review the behavior plan and make necessary changes.
- A change of placement occurs for removal for more than ten consecutive days or if a series of suspensions forms a pattern based on the length of each suspension, the total amount of time the student is removed and the amount of time between suspensions. A manifestation determination, other procedural safeguards and previous steps for less than ten day suspensions must be implemented.
- Schools can unilaterally assign the student to an IAES designed by the student's IEP team when the student brings a weapon to school or possesses, uses or sells drugs at school. The student may be suspended for ten days or less while the team designs the IAES. The parents must be notified "no later

than the date on which the decision is made" that the school is placing the student in an IAES and the notice of procedural safeguards must be provided. Within ten business days of the suspension, the IEP team must meet to design an assessment plan or review a current behavior plan. Within ten days of the decision to initiate the IAES, the student's IEP team must convene to conduct a manifestation determination review as in cases of expulsion. If the behavior is not a manifestation of the disability, the school may continue with the expulsion proceeding, and the IEP team would determine services to be provided once the student is expelled. If the behavior is a manifestation of the disability, the student may remain in the IAES for the 45 calendar days and then would be returned to his original placement unless a change of placement is agreed upon by the school and the student's parents.

- When triggered by dangerous behavior, the school can seek a judicial order to move the student to an IAES or can reach an agreement with the student's parents. Otherwise the school must seek an expedited due process hearing. To change the placement, the hearing officer must determine that the IAES includes services and modifications to address the behavior and prevent its future occurrence, determine with a preponderance of the evidence that the current placement is likely to result in injury, consider the appropriateness of the current placement, and consider whether the school has made reasonable efforts to reduce the risk of harm by use of supplementary aids and services.

Expulsion

- When a school seeks an expulsion[56] or move to an IAES for a period of more than ten school days, the school must notify the parent on the day the decision is made and provide notice of procedural safeguards. The student can be suspended for no more than ten consecutive school days (or 45 in IAES if drug or weapon related) and the school must convene the case conference within ten business days to formulate a behavioral assessment plan or to revise an already existing behavioral plan.
- Within ten school days of making the decision to expel or remove the student to an IAES, the school must conduct a manifestation determination conference to consider the evaluation and diagnostic results, observations of the student, and the student's IEP and placement. They must determine whether the student's IEP and placement were appropriate and

whether services were provided consistent with the IEP. They must also determine whether the student's disability impaired the ability to understand the impact and consequences of the behavior, and whether the disability impaired the student's ability to control the behavior.

- If the act was a manifestation of the disability, the case conference determines whether a change in services and/or placement is warranted and remedies any deficiencies in the IEP.
- If it is not a manifestation of the disability, the school sends notice of the decision and procedural safeguards to the parents, proceeds with the expulsion and sends records to the expulsion examiner. If the parent files for a special hearing, the student stays in the IAES until the 45 calendar day period expires, moves to another placement with the agreement of the school personnel and parents, or returns to the last placement under the current IEP.

References

[1] 20 U.S.C. § 1400 *et seq.*
[2] 34 C.F.R. § 300 *et seq.*
[3] OSEP memo on discipline
[4] 34 C.F.R. § 300.519.
[5] Honig v. Doe, 484 U.S. 305 at 325 (1988).
[6] 34 C.F.R. § 300.519.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] OCR Senior Staff Memorandum, 14 EHLR 307.05 (October 28, 1988).
[11] 34 C.F.R. § 300.121(d)(2)(i)..
[12] 34 C.F.R. § 300.121(d)(3)(i)..
[13] 34 C.F.R. § 300.520(b).
[14] 34 C.F.R. § 300.520(c).
[15] Although the phrase "continue to progress in the general curriculum" is used, that does not imply that the student must remain in the general education setting. On the contrary, the regulation includes the specific qualifier "although in another setting." 34 C.F.R. § 300.522(b)(1).
[16] Federal Register: March 12, 1999 (Volume 64, number 48), p. 12619.
[17] *Id.*
[18] 34 C.F.R. § 300.523.

[19] Because both the Act (20 U.S.C. § 1415(k)(1)(ii)(I) and the regulation 34 C.F.R. § 300.520(a)(2)(i)) use the phrase "carries a weapon to school or function," at least one court has ruled that a student possessing a weapon he obtained at school could not be placed in a 45-day interim alternative educational setting. The interpretation of the U.S. Department of Education is that Congressional intent would call for a broader application to include a weapon the student found at school. Federal Register: March 12, 1999 (Volume 64, Number 48) p. 12619.

[20] 34 C.F.R. § 300.520(a); 34 C.F.R. § 300.521.

[21] 18 U.S.C. § 930(G)(2). (Note: The exception for a knife with a blade less than 2 1/2 inches long would simply imply that a school could not unilaterally impose a move to a 45-day interim alternative educational setting for possession of such a knife; it could still expel a student who brings it to or is in possession of it at school or a school function if the school's disciplinary code bans knives of any kind).

[22] 34 C.F.R. § 300.520(d).

[23] 34 C.F.R. § 300.522(a).

[24] 34 C.F.R. § 300.522(b).

[25] 34 C.F.R. § 300.520(b).

[26] 34 C.F.R. § 300.526.

[27] 34 C.F.R. § 300.521.

[28] 34 C.F.R. § 300.52; 34 C.F.R. § 300.522(b).

[29] 34 C.F.R. § 300.521(d); Fed Reg.: March 12, 1999 (Volume 64, Number 48) p. 12625.

[30] *Honig*, 484 U.S. 305.

[31] 34 C.F.R. § 300.523(a)(1).

[32] 34 C.F.R. § 300.520(b).

[33] 34 C.F.R. § 104.35.

[34] OCR Senior Staff Memorandum, 16 EHLR 491, 493.

[35] 34 C.F.R. § 300.523(c).

[36] 34 C.F.R. § 300.523(c).

[37] 34 C.F.R. § 300.523(c)(2).

[38] 34 C.F.R. § 300.523(f).

[39] 34 C.F.R. § 300.524(a).

[40] 34 C.F.R. § 300.524(b).

[41] 34 C.F.R. § 300.121(d)(3)(ii).

[42] 34 C.F.R. § 300.525(a).

[43] 34 C.F.R. § 300.514; 34 C.F.R. § 300.526..

[44] 34 C.F.R. § 300.527.

[45] 34 C.F.R. § 300.527(b).

[46] Fed. Reg: March 12, 1999, (Volume 64, Number 48), p. 12629.

[47] 34 C.F.R. § 300.527(c).

[48] 34 C.F.R. § 300.527(d)(2)(ii).

[49] *Id.*

[50] 34 C.F.R. § 300.527(d)(2)(iii).

[51] Morgan v. Chris L., 106 F.3d 401 (6th Cir. 1997).

[52] 34 C.F.R. § 300.529(a).

[53] 34 C.F.R. § 300.529(b).

[54] 34 C.F.R. § 99.30; 34 C.F.R. § 99.31 (a)(9) and (10); 34 C.F.R. § 99.36.

[55] This term, as used in the IDEA regulations, does not include in-school suspension as long as the student is afforded the opportunity to continue to appropriately progress in the general curriculum, receive services in the IEP and participate with non-disabled students to the extent he/she would be in current placement. It includes bus suspension only if transportation is a related service in the student's IEP and the school provides no alternative transportation.

[56] Also applies to suspension for more than ten consecutive school days or any other change of placement for disciplinary reasons.

11

Transition: Individuals with Disabilities

Stanley L. Swartz, Jeff McNair, and Joseph O. Turpin

Introduction

The Individuals with Disabilities Education Act (IDEA) extended mandatory public education to include planning and programs to ensure a successful transition from K-12 educational experiences to community integration including meaningful employment. Transition services are defined as a "coordinated set of activities for a student, designed within an outcome-oriented process, which promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation."[1] The emphasis of current legislative authority has developed from a growing research base indicating the need for coordination of agencies serving individuals with disabilities. The National Council on Disability[2] summarized these findings in making recommendations for the development of a national policy. The recommendations issued by this group included many of the elements that had gained recognition as needs that must be addressed to impact the transition from school to adult life. Their findings included:

- Upon leaving school, students with disabilities and their families have a difficult time accessing appropriate adult services.
- Effective transition planning for high school students with disabilities can facilitate their success in adult life.
- Graduates with disabilities are more likely to be employed following school if comprehensive vocational training is a primary component of their high school programs and they have jobs secured at the time of graduation
- There are insufficient partnerships between the business community and schools for the purpose of enhancing employment opportunities for students with disabilities.

- Parent participation during high school facilitates the successful transition of students with disabilities from school to adult life.

Support for the transition process can be provided on three different levels. First, there may not be any need for specific support. This lack of support would be the case for most students with mild disabilities. Second, students may need time-limited services including specific training such as on-the-job support or support in finding independent living arrangements. However, the assumption is that this support will only be needed for a specific period of time. Third, some individuals will need a specific type of support on an ongoing basis including specialized services permitting the individual to live normally within the community. Individuals with severe disabilities might be expected to need various levels of support throughout their lifetimes including ongoing support of an extensive nature. The outcome for each of these types of support is different. For individuals needing no support, time-limited support, or specific ongoing support, the outcomes are typically competitive employment and independent living. For individuals with severe disabilities that need ongoing support of an extensive nature, the expected outcomes are usually supported employment and supported living arrangements. Although in some cases, individuals with severe disabilities who need extensive and ongoing support may live independently and work in competitive employment.

Legal Issues

Transition Program

A successful school transition program can be conceptualized as a four step procedure: 1) foundation, 2) process, 3) culmination, and 4) follow-up. The transition foundation includes all education, training, and experiences which prepare an individual for adult life. An educational program is designed to develop functional skills, or skills that have a high probability of being required of someone as an adult. A foundation for students with mild educational disabilities will include academic skills that can be built upon with post-secondary vocational training or college training. For individuals with more severe educational disabilities, the curriculum will be more basic and include functional or survival types of academic skills. For all students, however, the curriculum should include training in social and vocational survival skills.

Survival skills are those that generalize across social and vocational settings. For example, social survival skills include behaviors such as responding appropriately to questions, appropriately expressing needs such as the location of a restroom, and appropriately interacting with others in social settings. Vocational survival skills include reporting to work on time, working at one's workstation for a continuous period of time, and asking for clarification if an instruction in not understood. The need for these types of skills is not specific to individuals with disabilities but rather are expected of all adults. The formal transition process begins at age 16 (14 when appropriate) when the schools are expected to begin transition planning with the development of transition goals within the Individualized Education Program (IEP) to prepare the student for the transition to adult life. As students approach graduation, IEP meetings should be attended not only by the student, parent and teacher, but also adult service providers representing agencies that might assist the student with transition. The IEP now includes a statement of the student's current levels of functioning, objectives relative to skill areas still in need of development as well as activities important to a successful transition, and who will perform the activities.

Goal development must be based on an individual student and take into account the interests and preferences of each student. Minimally, goals must address 1) instruction (including all types of education), 2) community experiences (community services including transportation, recreation, etc.), 3) employment and other post-school daily living objectives (not only does this include community based work experiences, but also functional adult activities including voting, paying taxes and utilizing Social Security or other government benefit programs), 4) acquisition of daily living skills (self-care, budgeting, etc.) and 5) functional vocational evaluation (vocational skill, interest or aptitude assessments). Additionally, the team must provide an explanation within the IEP if a determination is made that one or more of the goal areas are deemed unnecessary. These goals are part of the outcome oriented process which considers all post-school activities, not exclusively employment. Often there are related services which must also be described in order for a student to access attainable outcomes, i.e. benefits from special education.

A critical component of transition goal development is personal choice. In order to facilitate lasting outcomes, student buy-in is critical. Developing choice making skills through early student involvement in the IEP process will assist when students are later in the position of making decisions about their own lives. The law also facilitates this process by requiring Local Education Agencies to begin informing students of their rights one year prior to the age of majority under state law.

Transition culmination occurs with the actual movement from secondary school to adult life. The transition team is charged with the responsibility of ensuring a smooth change from school to community service agencies and the provision of the activities described in the IEP. Finally, transition follow-up is the last step. By evaluating outcomes, school administrators can adjust the program and the process to ensure the most appropriate outcomes.

Special Education Legislation

The importance of the transition from public school educational programs to appropriate postsecondary experiences for individuals with disabilities and the necessary support services to successfully accomplish this transition has a history that can be traced through public policy reflected in legislation and the resultant changing professional practices. That the individualized education program must now include a specific statement of the needed transition services is a result of a process that has included a research base demonstrating that the absence of such planning diminishes the likelihood of student success.[3] Additionally, political activism directed toward establishing the need for a follow-along plan for all children with disabilities has resulted in legislation that ensures a continuum of services for individuals with disabilities throughout their lives.[4]

The need for transition services has been addressed in special education, vocational education, and rehabilitation legislation. Culminating in P.L. 94-142, the Carl Perkins Vocational Education Act, and the Rehabilitation Act of 1973, and refined in the Individuals with Disabilities Education Act and the Americans with Disabilities Act, a summary of this history is instructive to the understanding of changing public attitudes and awareness and changing public policy.

The Education of All Handicapped Children Act of 1975 (P.L. 94-142) required that children with disabilities have available to them a free, appropriate public education; protected the rights of children with disabilities and their parents to procedural due process; and required safeguards in the evaluation and placement process. Central to this legislation was making increased federal funds available to the states for the purposes of assuring the implementation of this law. Key to the eventual recognition of the need for transition services was the provision that the effectiveness of these programs be evaluated.

P.L. 94-142 marked the first consideration that special education programs for children with disabilities were a right and therefore mandated. Two key provisions of the law, the individualized education program (IEP) provided in the least restrictive environment (LRE) paved the way for the provision of transition services. The IEP is a planning document that assures an appropriate education that is outcome-based. LRE is a requirement that children with disabilities be integrated with their nonhandicapped peers. The law also targeted a nontraditional population for service: the 18-21 age group. This group is the primary focus of transition programs.

Further legislation in 1983[5] addressed the need to coordinate the education and training of youth with disabilities to assist in the transitional process from school to employment and postsecondary education. Major emphases included the design of vocational programs to increase the potential of youth with disabilities for competitive employment and to encourage the development of cooperative training models between educational agencies and adult service agencies. This law marked the emergence of the transition process as a major focus in programs for children with disabilities.

A number of important revisions in secondary education and transitional services were included in 1986.[6] Programs were expanded not only for whom can be served but also the nature of the services to be provided. Services could now be provided to children recently graduated or exited from the public schools. Transition was reconceptualized as a theme or programming throughout a child's school career even though it has as its purpose the transition to adult life. The Individuals with Disabilities Education Act expanded the concept of transition to include independent living and full participation of youth with disabilities in community programs as appropriate goals.[7] This change represents a movement from education as a means to competitive employment to a broader goal of full community integration. Requirements for IEP development include a statement of needed transition services by age 16, or age 14 when appropriate, and any necessary interagency responsibilities after school exit. Programs are expanded to address the development of job skills for transition to the workplace and social skills to enable youth to participate fully in community life.

Vocational Education

The Carl Perkins Vocational Education Act allocated federal funds for equipment, staff, and buildings.[8] Ten percent of funds available under this act were earmarked for students with disabilities and 22 percent for the disadvantaged. This act provided for assessment of interests and abilities related to vocational education programs; special services, including adaptation of curriculum, instruction, equipment, and facilities; guidance, counseling, and career development activities conducted by professionally trained counselors; and counseling services designed to facilitate the transition from school to postschool employment opportunities. By its very inclusion in *Carl Perkins*, vocational education for students with disabilities was legitimized. The focus of programming from education in the traditional academic sense to programs that emphasize employment and necessary functioning for adult life was made possible with the requirement that a portion of the funds authorized under this act be reserved for use by programs designed to benefit individuals with disabilities.

Rehabilitation Legislation

Building on a long history of the progressive expansion of services to individuals with disabilities, the Rehabilitation Amendments marked the major entry into training for competitive employment.[9] Though earlier establishment of sheltered workshops had employment as a goal, this legislation placed efforts in integrated community settings. The Rehabilitation Act of 1973[10] provided the statutory foundations for the Rehabilitation Services Administration and established priority for rehabilitation services to those with the most severe disabilities; initiated and expanded programs for individuals previously being underserved, including homebound and institutionalized clients; expanded employment opportunities for individuals with disabilities; included Section 503 which eliminated architectural and transportation barriers impeding citizens with disabilities in public governmental buildings; required an individualized written rehabilitation plan (IWRP) with an annual review which outlines, in the form of a contract developed in conjunction with the client, the conditions and responsibilities under which services will be provided; funded research and demonstration projects concerned with the rehabilitation of individuals with severe disabilities; and included Section 504 which prohibits discrimination against an individual solely by reason of the disability in any program or activity receiving substantive federal funds.[11]

Important to the eventual emphasis on transition for school-aged children was the inclusion of education for children with disabilities as one of the major features of the Rehabilitation Act. Children to be served by the public schools were guaranteed similar protections as adults served by rehabilitation and other service agencies. P.L. 94-142 was specifically referenced in the language of the law. This inclusion of school-aged children in the language of the act set the stage for the eventual coordination of services of various agencies because of the wide authority of this act.

Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978[12] continued and enlarged the three main trends of rehabilitation legislation: it increased the commitment to rehabilitation research by expanding its research provisions and by stipulating the need and the means for ensuring coordination in the research enterprise; it continued the movement from a focus on preparation for employment to a focus on preparation plus affirmative action for enlarging opportunities for competitive employment for individuals with disabilities; it continued the attempt to provide services to underserved populations, especially the individuals with developmental disabilities and other severe disabilities;[13] it authorized the expansion of rehabilitation to include independent living as an objective for individuals served under the act; and it provided employer incentives for training and hiring individuals with disabilities.[14] Programs that required an affirmative action-type push were encouraged by this act. Transition at its inception was this type of an effort. This act authorized the use of funds to provide a variety of support mechanisms that allowed transition programs to be mounted.

The Vocational Rehabilitation Amendments of 1986[15] made notable changes to include the use of supported employment (defined as employment in an integrated setting with ongoing support services) as an acceptable outcome for the rehabilitation program.[16] Much of the historical emphasis of the state/federal rehabilitation agencies had been in rehabilitation that resulted in almost total independence of functioning for clients. This had the obvious effect of excluding serious efforts on behalf of individuals with moderate and severe disabilities. This act legitimized and authorized funding for services which were supportive in nature and expected to be ongoing. Much of what is provided as transition programming is authorized in this act.

The Americans with Disabilities Act[17] was federal civil rights legislation that barred job discrimination against individuals with physical or mental disabilities. Access for individuals with disabilities to mass transportation, public buildings and transportation (defined as commonly used by the public), and governmental services has also been assured.[18] This act is considered an important extension of the Rehabilitation Act of 1973 because of the dramatically increased number of employers (those employing more than 15) that are affected. This act is seen as a last step in a process designed to ensure the integration of individuals with disabilities into the mainstream of American society. Any effort or program that could assist in the integration is authorized under this act. The recognition that many individuals with disabilities will need support throughout their lives is carefully included in the provisions of the law. Transition that is initiated under laws governing special education in the public schools has as its goal the support for programs in keeping with the provisions of this initiative.

Employment Related Legislation

The Job Training Partnership Act of 1982[19] was designed to shift training away from the public sector to the private sector. Individuals with disabilities are targeted as a special population for services under this act. Incentives were made available to employers to accommodate individuals with disabilities in community-based employment settings. The Supplemental Security Income Improvement Act of 1986 removed work disincentives by allowing recipients to work without loss of benefits.[20] It allowed participation in a variety of training programs, including supported employment, while still receiving income assistance.

Taken together, these pieces of legislation chart the evolution of programming for individuals with disabilities from regular education programs to programs and services that ensure a continuum beginning in the public schools and extending to community integration. Such a movement was a public recognition of the need to coordinate efforts on behalf of individuals with disabilities as various governmental agencies assumed responsibility for service provision. It is important to remember that new initiatives built into legislation do not develop in isolation. Research demonstrating program efficacy and professional practice that evolves because of field-based experience and research are important to the ultimate recognition that change is needed. One good example of this influence can be seen in the review of the Education for the Handicapped Act implementation mandated by Congress. In both the Eleventh[21] and Twelfth[22] Annual Reports to Congress, the need and importance of transition to the eventual success of students as adults are highlighted.

Recommendations for Practice

The focus on transition represents an important milestone in the history of efforts to serve individuals with disabilities. Past efforts were basically designed to guarantee access. Current efforts focus on the outcomes of special education. There has been a clear recognition that children with disabilities usually become adults with disabilities and that programming must be coordinated between agencies that serve children and agencies that serve adults. Do our

BEST COPY AVAILABLE

efforts result in the successful integration of individuals with disabilities into the adult world? Do public school programs target eventual adult status and community participation? Have agencies with programming responsibility for individuals with disabilities developed agreements that will ensure continuous service during the transition from school to work and community living? Have the community agencies developed agreements with regard to the agency that will take primary responsibility with regard to case management? Current legislation suggests some practices that can be recommended for site level program administration.

- An individualized education program (IEP) must be developed for each student. This plan must include descriptions of services and who will be responsible for providing the services. It is important to note that this plan will include a wide variety of activities that are other than traditional academic programming. Efforts will include cooperation with other service agencies.
- Individualized education programs (IEP) should be carefully developed to ensure that all necessary information is included. Service recommendations will not be needed for each individual in all areas. The IEP should include consideration of each of the following areas: instruction, community experiences, employment and other post-school living objectives, acquisition of daily living skills and functional vocational evaluation. Any area for which there is a recommendation must also include a statement of who will take responsibility for carrying out the action.
- Cooperative relationships and agreements should be established with adult service agencies such as the Departments of Rehabilitation, Mental Health, and Developmental Disabilities. Collaborative programs should be initiated to ensure that the transition from school to work or postsecondary programs will be a smooth one. An individual should be appointed with specific responsibility to serve as a liaison with community service agencies.
- School curricula should be focused on the development of functional skills; those skills necessary for successful adult life. Programming for youth with disabilities should include some balance of attention to vocational, independent living and recreation and leisure activities. It must be recognized that appropriate programming for students with disabilities will not, in the vast majority of cases, be parallel to the regular academic programs. The law, however, requires that the least restrictive environment be enforced. Students who are able to be

successful in the general education program, with support, must be provided the opportunity to do so. Decisions about inclusion must not be made exclusively on the basis of philosophy. Rather student performance data should guide these determinations.

- Schools must make renewed efforts to involve families in the program development process. Parents who are full participants in program planning are less likely to initiate legal challenges that are costly both in time and resources.
- Because transition is an outcome-based process, data collection is of increased importance. Follow-up studies of program graduates should be initiated. These data can be used to make any necessary program modifications.
- Transitional programming for youth with disabilities should be viewed as a proactive process. Program opportunities that will enhance the likelihood of student success should be identified and supported. Schools need to take the initiative in developing community-based vocational programs. School programs that have the greatest potential for practical application in adulthood should be developed. Programs that have no demonstrable adult applications should be abandoned.
- Efforts to educate school personnel and the public to the fact that appropriate programs for youth with disabilities are functional rather than academic should be initiated. The function of schooling for this group of children is to prepare for successful adulthood, and this information should be established and communicated.
- A final area is for transition planners to develop an awareness of community based, existing natural supports. Increasingly, these resources are receiving attention in the research literature. Exemplified by groups including churches and economic organizations, social or athletic groups and business clubs, there is great potential in facilitating community integration through these voluntary attachments.[23]

References

[1] Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et.seq.*

[2] *The education of students with disabilities: Where do we stand?* National Council on Disability. (1989).

[3] Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et.seq.*

[4] Americans with Disabilities Act, P.L. 101-336 (1990).

[5] Education of the Handicapped Amendments of 1983-Secondary Education and Transitional Services for Handicapped Youth, P.L. 99-199.

[6] Education of the Handicapped Act Amendments of 1986, P.L. 99-457.

[7] Individuals with Disabilities Education Act of 1990 *supra*, note 3.

[8] Carl Perkins Vocational Education Act of 1984, P.L. 98-524.

[9] Vocational Rehabilitation Amendments of 1968, P.L. 90-391.

[10] Rehabilitation Act of 1973, P.L. 93-112.

[11] *See*, R.M. GARGIULA, *Litigation and legislation for exceptional children: An historical perspective*. ICEC Q., 29(1) (1980), and G.N. WRIGHT, TOTAL REHABILITATION (1980).

[12] Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, P.L. 95-602.

[13] L. DESTEFANO & D. SNAUWAWERT. A VALUE-CRITICAL APPROACH TO TRANSITION POLICY ANALYSIS (1989).

[14] Individuals with Disabilities Education Act of 1990, *supra*, note 3.

[15] Rehabilitation Act Amendments of 1986, P.L. 99-506.

[16] D. BRADDOCK & G. FUJJURA, *Federal foundations for transitions to adulthood*. In B. LUDLOW, A. TURNBULL, & R. LUKASSON. TRANSITIONS TO ADULT LIFE FOR PEOPLE WITH MENTAL RETARDATION—PRINCIPLES AND PRACTICE (1988)

[17] Americans with Disabilities Education Act of 1990, P.L. 101-336.

[18] C. BAIRD. *ADA - Bridges, not barriers for people with disabilities*. THE SPECIAL LEDGE, 5(1) (1990).

[19] Job Training Partnership Act of 1982, P.L. 97-300.

[20] Supplemental Security Income Improvement Act of 1986, P.L. 99-643.

[21] *Eleventh Annual Report to Congress on the Implementation of the Education of the Handicapped Act*. Dep't of Educ. (1989).

[22] *Twelfth Annual Report to Congress on the Implementation of the Education of the Handicapped Act*. Dep't of Educ. (1990).

[23] MCNAIR, J. (1997). *A discussion of networks supporting adults with disabilities in the community*. The Center for the Study of Religion and Disability. Available at http://www.geocities.com/athens/2926/

12

Parents' Rights: Pitfalls of IEP Meetings

Susan G. Clark and Julie C. Martin

Introduction

An underlying assumption of the Individuals with Disabilities Education Act[1] (IDEA) and its regulations[2] is that parent participation is a fundamental component necessary for the provision of a free appropriate education (FAPE). Specific provisions addressing parental involvement were written into the law because Congress recognized that parents have unique perspectives of their children and can contribute to educational planning for them.[3] This legislative intent became even more evident with the amendments to the IDEA authorized in June, 1997.[4] The legislation is replete with expectations for parental involvement in all aspects of a child's special education.[5] Parents are to be involved in any and all educational decisions about their child including referral, evaluation, assessment, eligibility, placement, and instruction.

School officials, however, may not be cognizant of the extent to which a parent may participate in the process of designing individual educational plans (IEPs) or in implementing special education placements under IDEA requirements. Consequently, school district officials may complicate the IEP meeting proceedings by erring against both the spirit and intent of the law. The purpose of this chapter is to outline the general rights under the IDEA that a parent may exercise concerning special education so that school administrators, teachers, and other professional school personnel, obligated to provide a FAPE, conduct an IEP meeting that is both inclusive within the requirements of the law and is responsive to parent rights.

In order to individualize education for students with disabilities, professionals, paraprofessionals, parents, and others must work together to craft specially designed instructional programs that meet the unique needs of the child. By assuming the role of a school leader who is knowledgeable about the curriculum options, staff, and resources in the district, the principal is in an unique position to inform, advocate, and educate the team and to clarify any matters to parents or faculty and staff in the decision-making process. Indeed, the IDEA Amendments require that the IEP decision-making team include a representative of the district who is qualified to provide or supervise special services and who possesses knowledge about the general education curriculum and the resources of the district.[6] Although there are numerous individuals in schools who may assume that role articulated in the legislation such as special education or curriculum directors, the building principal brings an unique perspective and in-depth awareness of building issues such as operating schedules, safety requirements, physical spaces, finances, and teacher interpersonal and professional relationships. To complicate the mix of personalities, skills, and professional preferences among school professionals, when new or unexpected viewpoints enter the discussion, an individual is needed who can ensure that each member has a voice in the process. Having duties that involve frequent communication with families, community members, and others outside the daily professional relationships and among the teaching and support staff inside the building, a principal's role is well-suited to serving on the team.

Teachers and therapists in schools traditionally work independently of one another in the classroom and therapy room, and they may not be acclimated to the kind of group decision-making needed to craft an individualized education program that meets the unique needs of a student with a disability. The practice of shared decision-making can be difficult for professionals who have not traditionally made decisions in that way, especially if there exists strong disagreement among team members. Also, when relationships among members of the team are new, the interactions among members may not be comfortable and may influence the decision made. Team efforts must be mutual and targeted toward the delivery of appropriate education to the student. Student needs are paramount and the principal must be prepared to provide the consensus skills needed by the team to work effectively together so that any decision made has the student as its focus.

Legal Issues

Leadership

The principal is in an important position to work with teachers, staff, professionals, and the school community to identify training needs in curriculum development, integration, modification, compacting, and enrichment. The familiarity principals have with the general education program at all levels in the building makes them essential to any decision involving the individualization of curriculum to meet student needs. With greater political and community emphasis on the results of state-required competency or proficiency tests, principals have a vested interest in ensuring that all students learn and succeed.

Furthermore, those who are not fully cognizant of the district's finances, the building's budget, or other available resources cannot make affirmative commitments to parents at an IEP meeting about the nature or frequency of the specialized services that a student with a disability may require. Although the law allows the school district to appoint anyone to this position with the requisite knowledge, this position is often filled from the district's leadership team. Yet, a principal can serve in this role very well by providing substantive information about any resource decisions the team may be considering. Building principals possess intimate knowledge of their immediate and anticipated budgets and are involved in planning current and future staffing decisions. Too often, IEP team members have not included a building-level or central office level administrator that can authorize creative placements or the costs of additional support personnel. Consequently, decisions may be made that involve hiring or reassignment of personnel, equipment, or materials, or changing bus routes that require a delay in service delivery until the authorization for the expenditures is issued. The inclusion of the principal or special education director in this capacity allows for decisions that reflect and incorporate both the parent and school district perspectives.

Also, the building principal is knowledgeable about the overall operations of the school. With wide-ranging responsibilities for providing a safe and effective teaching and learning environment, the principal can bring important matters to the table that may be overlooked. For example, if a student uses a wheelchair, a walker, or is otherwise ambulatory only with supervision, the principal is in an unique position to discuss building egress in the event of a fire, tornado, or other crisis. The location of classrooms, the assignment of personnel with responsibility for assisting those who are nonambulatory or who are using wheelchairs, and the identification of safety procedures are all matters that the principal needs to discuss regarding any student's needs.

Importantly, the spirit and intent of the IDEA is to preserve due process during the IEP proceedings. The principal generally has broad experience in protecting the due process rights of students. Because the rights of students with disabilities are foremost, especially by ensuring that parents participated in the process and were meaningful partners in the educational decisions, principals are key to safeguarding those rights. They may ensure that procedures were followed and that the process by which the student was placed in the least restrictive environment was proper and inclusive of all team members. The monitoring of the plan is essential as well, and the principal can work as part of the team to include those individuals who will be implementing the program and evaluating its effectiveness.

Finally, since the principal shares the responsibility for staff development, a mechanism should be in place to allow for professional reflection on team working relationships. The education of students, with or without disabilities, is a collective responsibility of the school community. An atmosphere of collegiality and commitment can be fostered by an administrator that models inquiry and reflection skills. Not only does the principal lead by example, but also by providing training in skill acquisition that may be curriculum-related, process-related, or skill-related. Establishing ground rules for professional behavior to manage conflict and disagreement or facilitating the means to discuss team functioning, the ways sensitive issues are handled, and the needs for growth and improvement on the team are important administrative roles.

Evaluation

Parents' rights to participate in the development of their child's educational program begin even before the child is found to be eligible for special education services, in fact, even before testing. Parents play an integral part in the process of referring for evaluation students who may have disabilities.[7] School districts have an obligation to "find" all children residing within the district who may have disabilities, even those students who attend private schools.[8] Typically, school leaders provide contact names and phone numbers in district publications so their residents may notify and request school personnel to conduct an evaluation. Information provided by the parent during the referral and assessment period is an important factor in gathering relevant functional and developmental information about the student.[9] This information from the parent perspective is necessary for school personnel to understand and consider as the IEP team makes the determination as to the need for special education.[10]

Parents must give written consent before school authorities may conduct an initial evaluation (or place a child in special education).[11] School officials must ensure that parents are informed of their rights in a language that they understand (e.g., if the parent is nonEnglish-speaking or in need of sign language).[12] Full and informed consent is essential to protect the rights of the child and may be withdrawn at any time, including during the evaluation, identification, or placement stages of the process.[13] Even if a parent has given permission for school officials to conduct an evaluation, that permission does not indicate that the parent will agree that the child requires special education services. Importantly, signed parental consent for evaluation cannot be considered to be any implied consent for placement.[14] In the case where a teacher or others from the school district suspect a disability, but the parent refuses consent for the evaluation, school officials may continue to pursue the assessment by using mediation or due process procedures.[15] School staff also may attempt to work with families to assist them in understanding the concerns they have about the child's education in an attempt to persuade them or they may bring in neutral third parties such as professionals from the federally-funded Regional Resource Centers. Juvenile court authorities may help to procure an evaluation if the student has been adjudicated. Some school officials have attempted to seek assistance to secure an evaluation by referring the case to the child protection authorities under the premise that the child's needs are being neglected. However, such a strategy may not be successful.[16]

Anyone who suspects that a child may have a disability may request an evaluation, including a parent. School district personnel are required under law to find all students suspected of having disabilities and are obligated to evaluate their learning needs. Once the decision to evaluate has been made, school officials must proceed without delay. Should the assessment process be delayed for any reason, including case overload or the desire to "wait and see," the district may incur unanticipated costs such as a due process hearing or required reimbursement of private school tuition if the parent places the child in a setting appropriate to the child's needs.[17]

The entire team, including the parent must meet as a part of the initial assessment process.[18] This initial purpose requires the team to review the results of the multi-factored evaluation, current classroom-based performance assessments, and any and all data provided by parents, teachers, and related services providers. On the basis of that review, the team determines whether or not the child is eligible for services.[19] No longer may school officials retain full control over the recommendation for eligibility (or placement) as was the case before the reauthorization. Under the IDEA Amendments, the parent is a full partner in the decision-making process.

Hence, the role of the parent in determining eligibility is equal to that of others on the team. Parents are not to be viewed as information-providers only, rather they are to be full and equal participants in all phases of decision-making from identification to placement to service delivery.

Additionally, a copy of the evaluation report and all eligibility documentation must be given to the parents.[20] School administrators, teachers, and other support personnel should encourage parents to retain all such records involving their child and the services provided, but there is no requirement that they do so. Some parents make requests to view standardized testing protocols and the notes made by examiners who conducted the assessments. Although IDEA is silent on the issue, the Office for Civil Rights (OCR) takes the position that test protocols are relevant records and essential to assess the findings made as to whether a student exhibits a disability.[21] School personnel should not maintain a policy or practice of categorically destroying test protocols or of refusing parents access to them.

An important point in constructing an evaluation team is that the evaluators be qualified and professional. There are many students with unique medical or behavioral conditions that require special treatment. Trained evaluators should be cognizant of any medical or other conditions and the effects those conditions have upon the testing process. If an assessment specialist does not have any expertise in working with students who have complex conditions or medical diagnoses and does not know how the suspected disability impacts test performance, the results will be questionable.

Under Congress' reauthorization to the IDEA, parent consent also is required for reevaluation, unless all reasonable measures have been taken to gain consent are demonstrably unsuccessful.[22] Subsequently, administrators and teachers must maintain accurate records that show phone calls to the parent went unanswered or unreturned; that letters, including registered mail, did not produce a meeting; and that other attempts, possibly visits to the residence, did not yield a mutual time and place for a meeting. Reevaluation is required once every three years or as needed at the request of the teacher, therapist, or parent. Notwithstanding this three-year requirement, the IEP team may determine that the child continues to be eligible for special education and related services and that no additional data is required to make that determination. Should the team come to this conclusion, the reevaluation process is streamlined and workloads may be reduced significantly. Still, if the team makes such a decision, the parents are entitled to written notice of the reasons for that decision. The parent has the right to seek additional data by requesting a thorough evaluation. This additional data may help the team to determine eligibility for services, present levels of performance, what special education and related services are needed, and what modifications are needed to allow the child to meet the annual goals and to participate as appropriate in the general education curriculum.[23]

Before the Meeting

Once the evaluation is complete and eligibility for special education has been determined, a parent, either alone or accompanied by a guest(s), has the right to actively participate in meetings for IEP development.[24] Participation does not merely require a parent's attendance at the meeting. To be true to the spirit and intent of the law, participation must be meaningful. The Office of Special Education Programs (OSEP) has suggested procedures to allow parents to engage in active decision-making.[25] One recommendation is for district officials to send pertinent information, such as draft IEPs, to parents prior to a meeting.[26] Importantly, members of the IEP team may prepare a draft that represents a preliminary assessment of the appropriate services that may be needed by the student, which could include goals and objectives, as well as the other IEP components.[27] In doing so, a parent can prepare for the meeting in advance by reviewing the recommendations of other team members made on behalf of their child. They then would have time to consider the drafted recommendations and prepare their own for presentation at the meeting. The team, however, must discuss fully all components of the draft document,[28] and it is vital that placement not be determined prior to the development of the final IEP document.[30] Another idea is to provide parents with IEP training on the construction of the document itself and program development before the meeting takes place.

Parents are to be notified in advance of any meeting for their child early enough to ensure that they will have an opportunity to attend. The notice of the IEP meeting sent to a parent must include a statement of the purpose of the meeting, its time, and the location. Meetings should be scheduled at a mutually agreeable time and place.[30] The notice must also indicate who will be in attendance so the parent may be fully prepared. School personnel can satisfy the notice requirement of who will be in attendance at IEP meetings by indicating the positions, and not the names, of those individuals (e.g., speech therapist, classroom teacher).[31]

The IDEA requires that certain persons representing the interests of the student be in attendance at the meeting. Under the statute's amendments, the IEP team must include a general education classroom teacher (e.g., fourth grade or high school social studies teachers), a special education teacher or provider (e.g., specific learning disabilities teacher or tutor), and the aforementioned representative of the district who is qualified to provide or supervise services, and who is knowledgeable about the general curriculum and the resources of the district (e.g., the principal, curriculum director). Also to be included on the IEP team is an individual who can interpret evaluation results (e.g., school psychologist, assessment specialist, special education director). Failing to include someone on the team with direct knowledge of the evaluation results may violate the IDEA. At the discretion of the parent or district officials, others who may have knowledge about the child such as related services personnel (e.g., occupational or speech therapists) should be in attendance as well. Notably, the student is to attend, if appropriate.[32]

While the legislation appears to require the attendance of a minimum of four persons, not including the parent or the student, the aforementioned roles may be filled by some of those already in attendance. For example, the special education director who may be familiar with the general education program, the district's resources, and the interpretation of evaluation results and their implications for learning; may take the place of the principal and school psychologist as presented in the above examples. Using this understanding, a related service person such as a physical therapist also may serve as the role of special education service provider.

Concerning the composition of IEP teams, the IDEA does not require that the general educator be the teacher that had the student in class or the teacher that will have the student in class. Certainly, it is logical to include those teachers who already know the student best or will be receiving the student into the classroom. The law merely requires that a general educator of the student be in attendance if the student will be or may be participating in the general education curriculum. Some districts may choose to include a general educator in all initial team meetings and phase out their attendance if the student is placed in a more restrictive setting than the general education program.

In contrast to the requirements that school officials notify parents about those anticipated to attend the meeting, parents are not under a similar obligation to notify school officials if they will be inviting any guests to accompany them to the meeting. Parents have been known to have invited additional team members that provide them support during the meeting such as family members, attorneys or advocates of any nature including tutors, ministers, physicians or therapists. Parents also may request the attendance of particular school employees such as teachers, therapists, or support personnel. Those invited to the meeting by parents may participate fully in the team decision-making. The freedom afforded to a parent to bring supporters to the IEP meeting, however, does not extend to the inclusion of representatives from the media (e.g., newspaper reporters, television investigative journalists).

Nonetheless, educators have been asked to accommodate unexpectedly more individuals than they were anticipating. While there is no obligation for parents to inform school district officials of these guests in advance of the meeting, their unannounced arrival may require the rearrangement of seating, a room change, or prompt school officials to include other personnel or support staff that might better address the concerns that may be brought out at the meeting than just those members present initially. The principal or other decision-maker may obtain another location if the designated meeting space is rendered inadequate or may seek to reschedule the meeting if the size of the group cannot be accommodated appropriately.

An IEP meeting can be held without parental participation if school personnel have been unable to convince the parents to attend. Before having a meeting without the parents, school personnel should have documentation of their efforts to contact the parents. This documentation should represent the ways in which school staff have made a good faith effort to include the parents in the meeting. Records of telephone calls made need to be included as well as the results of those calls. Documentation also should comprise all copies of correspondence sent to the parents and the responses received. Lastly, detailed records of visits made to the parents' home or place of work are essential to demonstrate the efforts made to ensure parent attendance.[33] Nevertheless, if neither parent can attend a meeting, school personnel should encourage their meaningful participation by other methods such as a telephone conference call during both teachers' contractual hours and the parents' lunch hour.[34]

Administrators should be aware of any limitations that union contracts place on the availability of school personnel. There are some negotiated master agreements that disallow work-related meetings before or after the contracted teacher work day.[35] Careful attention must be paid to this restriction and, if necessary, arrangements for substitute teachers and release time may be required. Another potential solution in lieu of violating the contract if a meeting is scheduled after the teacher workday is to have team members that cannot be at the meeting participate by telephone conference call. Team members such as those that provide related services may only need to be available for a part of a meeting.

Some teachers may feel the need to bring their own supporters to IEP meetings to ensure that their professional interests are protected. However, there is no provision in the IDEA for teachers to bring along anyone to guard their interests, including union representatives, at IEP meetings. The role of a union representative is to advocate for teacher contract rights and monitor for potential violations of the terms and conditions of employment. Yet, the IEP meeting is to be conducted with the assurance that the student's rights are inherent in all aspects of decision-making. Should a teacher invite a union representative to attend for the purpose of advocating for training, support staff, or in-class supplemental services, any decision the team would make must be based on the student's needs and not the teacher's desires. The IEP meeting is not a forum to discuss the factors affecting the terms and conditions of employment as a teacher; that is a duty for good faith bargaining. Issues such as teacher release time for completion of paperwork or attendance at meetings, or extra pay for unanticipated professional duties are not matters for the IEP team. The principal may remind the team that while some states have provisions that allow collective bargaining contracts to override state law (e.g., with respect to teacher tenure), such negotiated agreements cannot override federal law.

The principal must intervene under these circumstances to be an advocate for due process rights inherent in the law and to keep the meeting focused on the student. The principal should guide the process and the members to keep the subject of the meeting on planning for student success and growth. Should the focus of the meeting shift away from the student, the principal should ask the team to consider reconvening at a time when student needs are at the fore. Furthermore, those in attendance are to be knowledgeable about the child and the child's strengths. The meeting is geared toward the creation of an appropriate educational program for the student.

Since parents must be notified of those who will be included in the meeting, even if the union representative was included in that notice, it should be noted that the school district also is obligated to have prior written consent from the parent that confidential educational records will be disclosed to a person without a legitimate educational interest in their child. Under the Family Education Rights and Privacy Act (FERPA),[36] the school district may be in violation of the student's privacy rights unless prior written consent is secured from the parent.[37]

School administrators should be cognizant of scheduling meetings, not only with consideration of the parent's availability and schedule, but also with consideration of the school personnel who will attend the meetings. Although a parent may request the attendance of particular school employees at the IEP meeting, the school district is under no obligation to ensure that those persons will be present (e.g., before or after the contracted work day). Additionally, persons invited to the meeting need not attend for the entire meeting, but may stay and participate during the portion of the meeting relative to their expertise. It should be noted that local school agencies are not obligated to continue an IEP meeting for as long as the parent wishes. Instead, a district is required to allow sufficient time at the meeting to ensure meaningful parental participation. School personnel can adjourn a meeting after a reasonable time, even against a parent's demands that the meeting continue.[38] If it becomes evident that the time scheduled for the meeting is insufficient for any number of reasons including the introduction of unanticipated elements or the inability to reach consensus, another meeting can be scheduled in an attempt to reach closure. Additionally, if there are several time-consuming factors to discuss at a planned meeting, an agenda should be devised so that only certain matters are discussed at any one time.

During the Meeting

A parent is to be included as a team member in all meetings for which the purpose is to make educational decisions about the child. This requirement of the law provides for parent input prior to and during the decision-making process. Parents may be reluctant to participate or speak out in disagreement if they question their qualifications to contribute, or they may view themselves as lacking communication skills. School personnel also may contribute to parent reluctance by approaching the decision-making informally and without due respect to parents. Professionals may overlook that parents may have had negative experiences with school staff or that some educators on the team may not view parents as equal partners. Some parents do not speak English or may be deaf or hearing impaired. If that is the case, school officials are required to provide interpreters to facilitate meaningful communication among all members of the team.[39]

The IEP meetings, like due process hearings,[40] may be audio or videotaped by the parent.[41] Notably, the permissible use of a tape or video-recorder at IEP meetings is not addressed either by IDEA or its regulations.[42] However, in a clarification on this matter, the

United States Department of Education stated that public school officials have the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP meetings.[43] Therefore, a school district may prohibit tape recordings; but to do so, the school district must have in place a policy that provides for exceptions, if necessary, to ensure that the parent understands the IEP or the IEP process. If permitted, requests that the meeting be audiotaped should not be viewed as indicators of mistrust or threats to sue, although many administrators and teachers find the practice objectionable. Nevertheless, the taping of meetings should be a clarion call to sound professional practice. Should school officials choose to record the meetings, the tapes become educational records subject to parent access.[44] Parents may be provided a copy of the tape, a written transcript of the proceedings, or in the case of no audiotaping, a contemporaneous record of the meeting written by a school district appointee. This verbatim record should be transcribed, as handwritten notes may be subject to various interpretations if not clearly legible.

The purpose of the IEP meeting is to plan, review, or revise the goals of special education service delivery to a student with a disability. The meeting is to include discussion of the resources school district officials have dedicated or will dedicate for the attainment of those goals. Individualized Educational Programs are required to include a statement of the student's present levels of educational performance and how the disability affects the student's progress in the general education curriculum.[45] Hence, reliance on reporting normative (i.e., test) scores as descriptors of the present levels of the student's performance may not communicate exactly how the nature and severity of the disability impacts upon participation in the general education program. The principal or LEA representative can act as a translator for the parent if communication becomes bogged down in technical language. Discussion and written statements should be free of educational jargon and should be descriptive of the student's strengths and needs as they impact upon the general education program.

There is an emphasis in the law that annual goals and short-term objectives (i.e., benchmarks) will be generated to enable the student to be involved in and progress in the general education curriculum.[46] There is a necessity that a principal or his/her designee be in attendance to address planning for accommodation and adaptation of the general education program and implications concerning service delivery in the general education setting. Therefore, it is imperative that each child's needs be considered individually in order to ensure that all aspects of the program have been addressed according to those needs. The new legislation also requires that parents be informed of their child's progress toward the IEP goals at least as regularly as parents of students without disabilities are informed of academic progress.[47] Since parents of students without disabilities routinely receive interim progress reports and grade card reporting and attend parent-teacher conferences, parents of students with disabilities "now must be routinely informed" of their child's progress. The principal needs to assist teachers in the process of developing these reporting routines, especially if such reporting had not been part of special services operations.

Furthermore, the IEP must include a statement as to the supplementary aids and services that will be provided so that the student may be educated and participate with students without disabilities.[48] Most notably, the legislation requires that the IEP include an explanation as to the extent that the students *will not* participate with children without disabilities in the general education program.[49] These new IEP components emphasize Congress' intent to include children with disabilities in the general curriculum, but in no way do these elements suggest that the continuum of services has been eliminated. Teams are required to consider the provision of FAPE for each child individually, and the parent's voice is one of many in that process. Nonetheless, the parent may not dictate the level of teacher training, the methodology, the curriculum, or the location of the program.[50] The team must strike a balance that permits interactive discussion and collaboration on matters that are important to the parent but remain decisions within the prerogative and authority of professional educators.

Under the reauthorized IDEA, students with disabilities are to be included in state and district-wide assessment programs with appropriate accommodations where necessary.[51] Should a student not be able to participate in the proficiency or achievement testing program, exclusion must be explained on the IEP as to why the assessment was inappropriate and alternative assessments then must be provided.[52] Inclusion in these general or alternative testing programs is for the purpose of judging students' progress and making decisions about the outcomes of special education. School officials may be challenged to explain why a student is being excluded from these important progress and achievement measures. The information about measurable academic growth is vital to school officials and parents alike, especially for program and instructional planning. The school district must have on file guidelines for the participation of students with disabilities in assessment programs, and a parent is entitled to review those policies.

Finally, the new legislation also requires that beginning at age fourteen, a statement of transition services needs must be discussed on the IEP.[53] The needs identification process is a way to focus the team on resource planning for the student related to the course of study. At age sixteen, a statement of transition services that will be provided must be incorporated into the IEP, including a statement of interagency responsibilities or linkages.[54] These transition services are to address the student's needs beyond the years of public schooling. They are statements of resources to plan for adulthood whether a college preparation program is to be provided or life skills training. Transition planning is an important component of the intent to ensure that the outcomes of special education lead to productive adulthood, employment, and independent living.[55]

Additionally, the team should consider the changes brought about for the student when the age of majority is reached if state law addresses the matter.[56] The team must make a statement that students (and parents) have been informed of their rights, if any, that transfer upon the age of eighteen.[57] In the case of an adult child over the age of eighteen,[58] IDEA provides for a parent to retain decision-making rights dependent on the type and severity of the disability.[59] However, the team should begin discussion of the transfer of rights to the student early enough (i.e., at least one year before the student reaches the age of majority) in the process to permit the parents to make any necessary adjustments and to permit school officials to meet the notice requirements. Clearly, parent input into this required decision-making is needed and team meetings must be structured to allow for and to elicit that input. There can be no delay in developing[60] the IEP or in implementing[61] the plan once the team has approved and signed the document.

Procedural Safeguards

States that accept federal IDEA funds must provide parents with notice and an opportunity to be heard on various elements of implementation.[62] One way that the IDEA elicits parent input is the requirement that local school officials consult with parents on federal funds expenditures.[63] Generally, official school district publications include a statement soliciting input for these program expenditures (e.g., Title VIB funds) from parents and community members. Yet, a process that incorporates dialogue and feedback such as open meetings that both inform and educate parents may serve the purpose as well and may permit more meaningful parent participation.

Local school agencies must approach any changes in a child's education with the understanding that parents have certain rights of notice before the agency can make any changes in the student's program. This prior notice requirement also applies before school officials refuse to make a change that a parent may be requesting. School personnel are required to give parents prior written notice whenever the agency proposes to change or refuses to change identification, evaluation, educational placement, or the provision of a free appropriate public education.[64] This notice must include a description of what action the district is proposing and an explanation of why it is proposing to take that action or why it is refusing to take the requested action. School officials must also include in the notice a description of other options considered and reasons why those options were rejected. Further evidence of the importance of data-based decision-making is that the notice must indicate each evaluation, test, record, or report that was used as the basis for the proposed (or refused) action and must include a description of any other relevant factors to the action.

Parents must be given a statement of procedural safeguards and any sources for parents to contact should they need to obtain assistance in understanding their rights.[65] Most local school districts already have procedural safeguards pamphlets in place. These brochures are tools to inform parents of their rights and their child's rights under the law. Special care needs to be taken to make sure these are accurate in light of the amendments to the IDEA. For example, individuals who cannot read English must be given notice in another format such as in their native language,[66] or by audio or videotape. School leaders may want to consider providing the notice requirements on video or audio-tape for those parents who speak English but cannot read. Also, the pamphlets now must include procedures for placement in an interim alternative educational setting[67] and requirements for unilateral placements by parents seeking public payment for the costs of private schooling.[68] Should parents choose to place their child in a private school setting, they are required to notify school district officials, at minimum, within ten days of the student's removal from the public school.

Disagreements over any aspect of the provision of special education are to be settled through well-defined procedural and due process safeguards put into place under IDEA to protect parent and child rights.[69] Conflicts often arise over differences over what constitutes an appropriate education. Notably, FAPE is the child's right, not the parent's right. Hence, there may be disagreement over what educational programming or placement is in the best interests of the student. Parental preferences alone cannot be the basis for compelling school officials to provide certain services or instructional methodologies to a child.[70] Should such variance in opinion arise, a parent may seek an impartial hearing with judicial review with representation by counsel,[71] and should the parent prevail, the school district may be subject to costs and attorney fees. School officials also may request a due process hearing to ensure that students who require special education and related services get the educational programming that they need.[72]

Parents may seek an independent educational evaluation at their own expense, just as they are free to employ tutors outside of the school day. If they choose to seek an evaluation of their child's abilities or achievement at their own expense, they are under no obligation to share the results with educators, unless those results are pertinent to any educational decision-making about their child's placement or program. Should they choose to share the evaluation results, school officials are obligated to give consideration to the data included in the report.[73] Data collected from an independent educational evaluation must be considered by school officials with respect to any decision that may involve the child's right to a FAPE.

However, a parent also may seek an independent educational evaluation at the school district's expense if they disagree with the results of the school district's assessment.[74] If the public school district pays the costs for the independent evaluation, school officials are entitled to review and consider the report. Additionally, parents may be under no obligation to specify the areas of the evaluation with which they disagree.[75] Parents may not select any independent evaluator of their choice, however. The criteria for selection of such a person must be the same as those possessed by the school district's evaluator if the assessment is to be provided at public expense.[76] Parents are to be notified of these rights, including where to find qualified evaluators.[77]

A parent also may choose to enroll a child in a state-unapproved school[78] or private school. A parent may request special education services to be delivered at the private school (e.g., sign language interpreter). The IDEA requires that school districts must spend an equal proportion of their federal special education funds on those students requiring special education that are privately placed,[79] yet, students so situated are not individually entitled to receive some or all of the special education they would have received if enrolled in the public school.[80] Parents cannot bring a due process claim for the services (or lack of) received by their child in private school, but may receive a hearing regarding their concerns about the evaluation.[81] Furthermore, the school district will be required to pay for any costs incurred only if school officials are found to have violated the IDEA[82] or the public school program is found not to constitute a free appropriate education.[83] Under the IDEA Amendments, mediation is now a tool that may be permitted to allow a trained impartial third-party to work toward bringing the team to consensus before the disagreement reaches impartial hearing.[84] The mediation process must be offered if the parent files a formal complaint; thereafter, it is voluntary on the part of both parties, and cannot be used to deny or delay a parent's right to a due process hearing. There is no cost to the parent or school district for mediation; the state bears the cost.[85]

Attorney's fees are prohibited related to any meeting of the IEP team unless the meeting is convened as a result of an administrative hearing or judicial action. Furthermore, a new provision of the law allows attorney's fees to be reduced if the attorney representing the parent did not provide required information to the school district.[86] This information includes the child's name and address; the school currently attended; a description of the nature of the problem and facts relating to the problem; and what the parent proposes to resolve the problem to the extent known and available to the parent at the time.[87]

Many disagreements over placement occur when a student may be subject to disciplinary actions such as suspension or expulsion. Briefly, the new law allows school district personnel to suspend students with disabilities for no more than ten consecutive days. However, a manifestation determination must be made if a disciplinary action is contemplated as a result of drug or alcohol sales, use, or possession; or injury to self or others; or if school officials intend to make a placement change (e.g., to an interim alternative educational setting) for a period greater than ten days.[88] If a parent disagrees with the determination that a student's behavior is not a manifestation of the disability, an expedited hearing may be requested to consider the appropriateness of the change of placement.[89] Even with a one-day suspension, school officials are obligated to convene the IEP team to discuss the need for a functional behavioral assessment and the need for a behavioral intervention plan.[90] For disciplinary purposes, school personnel are obligated to treat students not yet eligible for special education under the same procedural safeguards as students identified as disabled, if school officials had knowledge that the child may be disabled. A school district will be considered to have knowledge of a disability if the parent has requested an evaluation in writing; or if the teacher or other school personnel has expressed concern about the behavior or performance of the student.[91] Expressions of concern include those made to any school personnel, including the principal. Administrators need to be informed if a teacher has suspicions that a student may have a disability or needs an evaluation and should take seriously any complaints or inferences about a student's behavior, performance, or affect. If a principal is alert to these statements and cognizant of their implications, there is indication that the evaluation process should be put into action. Staff and faculty must be made aware of this new provision of the law since failure to evaluate could constitute a liability for the district and delay required special education for the student.

Along with the guarantees of IDEA, parents of special education students also have rights to their child's educational records under the FERPA.[92] Under this federal privacy act, school officials may not destroy records[93] or release personally identifiable information of students to individuals (e.g., teacher union officials) or agencies (e.g., Social Security Administration, Bureau of Vocational Rehabilitation) without written parental consent.[94] The provisions of the FERPA include the right to timely inspection and review of records and the right to request record amendment.[95] Disagreements concerning records may be settled through an impartial hearing held at the parent's request.[96] However, if the hearing results in an unsatisfactory outcome for the parent, the parent may attach a rebuttal[97] to the record disputing the contested portion. There exists no private right of action for a parent under FERPA.[98]

Managing Conflict

Despite all attempts at safeguarding the student's and parent's rights and balancing the school district's obligations with its commitments, conflict can and will occur. However, disagreement over the components of the IEP or services to be provided do not need to become a stalemate. When conflict arises, school personnel will have to make sure they are meeting the letter of the law. They also will want to find non-adversarial ways of resolving the conflict, such as administrative review or mediation. However, building consensus throughout the process is important. Although consensus is a priority, principals and other team members should remember that parental consent does not mean that the signed IEP provides a free appropriate public education to a child or that the parent may not later bring a due process request. Recall that a parent can revoke at any time permission to test, place, or serve a student. Nonetheless, if no consensus is reached, the school agency is still required to formulate an IEP.[99] The due process procedures then will be implemented.

When conflict arises, school personnel may suggest an interim IEP to begin services on those areas of the plan which the team is in agreement. Interim IEPs are also an effective means to demonstrate the team's ability to cooperate and is a recognition that there are many ways to devise and implement IEPs. Also, the team may devise short-term placements (e.g., four weeks) to give the team time to collect observational and empirical data as to the appropriateness of the placement and the services.

The team could also agree to have more than one meeting should there be little agreement. Meetings could then be scheduled for specific purposes. Open-ended meetings can end in frustration because too many subjects are discussed without resolution. By honing the meeting in on key matters, each meeting becomes more thorough and specific. Once a decision has been reached, the team also can agree to interim meetings to check progress and review all aspects of the plan's implementation. Parents can be kept apprized of any successes or concerns and the lines of communication remain open.

The principal and other school officials will want to educate their staff. Faculty and staff need to be aware of the requirements of the law and how their actions may result in liability to the school district. For example, principals, teachers, therapists, and support personnel need to understand that they cannot take unilateral action about a child's education. Many principals are accustomed to solving problems quickly and efficiently, but the IDEA requires that an IEP team make decisions about the student's program and needs. Also, many teachers or administrators may not have had training in ways to create trust with families, to elicit important and useful information about the child's strengths and needs, or to resolve disagreement. Staff development is indicated. Many parents may not have had experiences in working as partners with school officials and parent training also may be indicated. Furthermore, school administrators are encouraged to review court orders to determine what rights non-custodial parents have in planning and implementing their child's special education. Some courts give equal rights to non-custodial parents for school purposes, and principals would be wise to respond appropriately to these circumstances.

In addition, it is useful to appoint a chairperson to the IEP team and assign responsibilities. For example, the chairperson can: 1) appoint a person to be the scribe; 2) appoint a person to conduct a follow-up for the next meeting; and 3) appoint a person to make sure deadlines are being met. The chairperson could be the principal or another person who was elected or volunteered for the role. Adherence to extensive procedural and due process requirements designed to protect the rights of both the child and the parent necessitates that administrators and teachers be informed and knowledgeable about the obligations under the law.

Recommendations For Practice

- Principals should be prepared to assert leadership to keep the team meeting focused on the needs of the child; to assist the team in problem-solving or in managing disagreement; to provide information about school operations or district resources; to ensure that parent input is meaningful; and to respond to any issues raised by guests (e.g., attorneys or other advocates) in attendance at the meeting.
- Principals should ensure that they, and teachers, therapists, support staff, and others in the school community are well-trained in the requirements of the law and its effects on their practices. Staff development should also be provided in curriculum development and modification, district and statewide testing requirements, in positive behavior management, teaching strategies and methodologies, effective teaming skills and decision-making, and communication skills.
- The team should follow these steps for notice: 1) reasonable advance written notice of change in pupil identification, placement, evaluation, or program must be provided to parent;[100] 2) notice must be in parent's native language and in understandable terms; 3) notice of IEP meetings must inform the parent of the time, place, purpose, and persons invited by the school; and 4) parents must be informed of all legal rights including due process and attorney fees.
- The following guidelines for obtaining consent should be followed: 1) parent written consent is required before preplacement evaluation or initial placement in special education;[101] 2) a parent may rescind consent at any time[102] 3) the parent's consent is not required for reevaluation if the district can demonstrate that it took reasonable measures to obtain consent and the parent failed to respond.[103]
- When developing the IEP the following should be considered: 1) a draft IEP may be brought to the meeting if it is fully discussed;[104] 2) the team must discuss any issue brought up by the parent; 3) team decisions on nonIEP issues not included in the IEP are not binding; 4) parent counseling and training may be considered a related service;[105] and 5) the parent has no right to compel certain methodology or program (e.g., cued speech over sign language).[106]
- During the IEP meeting the following should be considered: 1) the parent has a right to participate in all IEP meetings;[107] 2) the time and place must be mutually convenient;[108] 3) the par-

ent may tape record the meeting;[109] and if the school chooses to tape, the recording becomes a record subject to parent access;[110] 4) the parent may request the attendance of specific school employees although school officials may not need to make all those people available, or bring guests to the meeting (not including the media); 5) those invited by the parent may participate in proceedings; and 6) the parent is entitled to a copy of the IEP.[111]

- Outside the meeting, certain considerations should be made: 1) classroom visitation by a parent is subject to reasonable nondiscriminatory limits and 2) advocates may accompany the parent.[112]
- When disagreement occurs: 1) a parent may seek an impartial hearing with judicial review on any matter of disagreement over special education[113] with representation by counsel; 2) parent refusal of evaluation or placement may be subject to due process initiated by the school; 3) a parent may seek independent education evaluation without notifying school officials; and 4) a parent is entitled to recovery of attorney fees, if the prevailing party.
- Parents with special needs must be accommodated: 1) communication must be in a language parent understands[114] (e.g., Spanish or sign language—a school employee may serve as interpreter); 2) notetakers may be required for parent with disabilities; and 3) oral communication and home visits may be necessary for illiterate parent to meet the communication requirement.
- Divorced parents must be considered: 1) both custodial and noncustodial parent have rights[115] (under typical state law a noncustodial has full access and participation but not consent); 2) appointment of surrogate does not terminate parental rights; 3) a noncustodial parent is entitled to copies of general school notices, if requested;[116] and 4) either parent with joint custody may request an IEP team meeting or hearing.
- When a student reaches 18: 1) a parent retains procedural rights; and 2) parent rights transfer to the student unless a parent continues as decision-maker, with the consent of the adult child.[117]
- Certain requirements for private school placement are pertinent: 1) only the parent has the right to place student in an unapproved school;[118] 2) the parent is required to pay private school tuition if public school program is found to be FAPE;[119] 3) the school district will be required to pay for the private placement if it is found to have denied the student FAPE and

the private placement is determined to be appropriate;[120] 4) a parent may request evaluation by public school officials, including diagnostic speech and hearing; and 5) the parent may request sign language interpreter for child and other related services.[121]

- Principals must protect student confidentiality of records in case the meeting is attended by someone with an interest in something other than the legitimate interests of the student and assure parents of their rights to access such records, including test protocols. Remember: 1) the parent has access to confidential[122] child records[123] within 45 days of the request,[124] including group data specific to the child;[125] 2) the parent has a right to inspect, review,[126] and request amendment of student records;[127] 3) notice must be provided before destruction of records;[128] 4) personally identifiable records cannot be released to third parties without consent;[129] 5) the parent has right to copy of information to be released[130] but may be charged a fee;[131] and 6) the parent has right to hearing to contest records[132] and to submit statement of rebuttal.[133]
- Principals should monitor the implementation of the IEP through follow-up, interim progress reporting, and conferences and be prepared to remove obstacles to FAPE.

References

[1] 20 U.S.C. § 1400 *et seq.* (West 1997).

[2] 34 C.F.R. § 300 *et seq.* (1999).

[3] *For example*, 34 C.F.R. § 300, App. A, Question 5 (1999) reads:

> What is the role of the parents at an IEP meeting? The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing, and revising the child's IEP. This is an active role in which 1) discussion about the child's need for special education and related services, and 2) join with the other participants in deciding what services the agency will provide to the child.

[4] 20 U.S.C. § 1400 *et seq.* (West 1995), reauthorized as the IDEA Amendments Act, P.L. 105-17 (1997).

[5] IDEA requires that a surrogate be appointed if the parent is unavailable; although the parent continues to retain all rights; 20 U.S.C. § 1415(b)(2).

[6] 20 U.S.C. § 1414(d)(1)(B)(iv).

[7] *See, e.g.*, Robertson County Sch. Sys. v. King, 24 IDELR 1036 (holding that parent of preschooler put school district on no-

tice of its obligation to evaluate when she came to speak to director of special education).

[8] 20 U.S.C. § 1412(a)(3), 34 C.F.R. § 300.125.

[9] 20 U.S.C. § 1414(b)(2); 20 U.S.C. § 1414(c)(1)(B).

[10] 20 U.S.C. § 1414(c)(1).

[11] 20 U.S.C. § 1414(a)(1)(C).

[12] 34 C.F.R. § 300.500(b).

[13] *Id.*

[14] 20 U.S.C. § 1414(a)(1)(C)(i).

[15] 20 U.S.C. § 1414(a)(1)(C)(ii).

[16] Michigan Ass'n of Intermediate Special Educ. Adm'rs v. Department of Social Servs., 22 IDELR 220 (Mich. Ct. App. 1994).

[17] *See, e.g.*, Metropolitan Nashville v. Guest, 23 IDELR 232 (M.D. Tenn. 1995).

[18] 20 U.S.C. § 1414(c)(1).

[19] 20 U.S.C. § 1414(b)(4)(A).

[20] 20 U.S.C. § 1414(b)(4)(B).

[21] St. Charles Community Sch. Dist., 17EHLR 18 (OCR 1990).

[22] 20 U.S.C. § 1414(c)(3).

[23] 20 U.S.C. § 1414(c)(1).

[24] 34 C.F.R. § 300.345.

[25] *Letter to Sarzynski*, 21 IDELR 993 (OSEP 1995) (OSEP also said that a conference call is sufficient to secure participation of a student's teacher at IEP meeting); *Letter to Sutler*, 18 IDELR 307 (OSEP 1990) (alternative methods of participation other than actual attendance are permissible on a case-by-case basis if all participants agree); *Letter to Soffer*, EHLR 213:187 (OSEP) (IEP meeting may be held by computer conference if all participants agree).

[26] *See* G.D. v. Westmoreland, 930 F.2d 942 (1st Cir. 1991).

[27] *Letter to Anonymous*, 25 IDELR 1208, 1208 (OSEP 1996).

[28] *Letter to Helmuth*, 16 EHLR 503 (OSEP 1990).

[29] *See* Spielberg v. Henrico County, 853 F.2d 256 (4th Cir. 1988).

[30] 34 C.F.R. § 300.345. *See also, Letter to Anonymous*, 18 IDELR 1303 (OSEP 1992). (An anonymous inquirer asked whether a district may refuse to schedule IEP meetings in the late afternoon or evenings, or on weekends. OSEP responded that a district is obligated to make a good-faith effort to reach an agreement with the parents concerning scheduling IEP meetings. However, OSEP acknowledged that the language of these provisions does not preclude a school district from considering its own scheduling needs, including teachers' contractual hours).

[31] 23 IDELR 564 (OSEP 1994).

[32] 20 U.S.C. § 1414(d)(1)(B)(vii).

[33] 34 C.F.R. § 300.345(d).

[34] *Supra* note 25. (OSEP also said that a conference call is sufficient to secure participation of a student's teacher at IEP meeting); *Letter to Sutler*, 18 IDELR 307 (OSEP 1990) (alternative methods of participation other than actual attendance are permissible on a case-by-case basis if all participants agree); *Letter to Soffer*, EHLR 213:187 (OSEP) (IEP meeting may be held by computer conference if all participants agree).

[35] Radcliffe v. School Bd. of Hillsborough County, 38 F. Supp.2d 994 (M.D. Fla. 1999) (refusing to consider a request for a preliminary injunction for failure to exhaust administrative remedies; parents sought to require school officials to schedule the meeting at 7:00 PM after educators refused to schedule the meeting outside regular working hours).

[36] 20 U.S.C. § 1234g (1992).

[37] 20 U.S.C. § 1232g(b).

[38] Grapevine-Colleyville Indep. Sch. Dist., 21 IDELR 875 (SEA Tex. 1994).

[39] 34 C.F.R. § 300.345(e).

[40] 20 U.S.C. § 1415(h).

[41] *See* Gardner v. School Bd. of Caddo Parish, 958 F.2d 108 (5th Cir. 1992).

[42] 34 C.F.R. Part 300, App. A., Question 21.

[43] *Id.*

[44] *See, e.g.*, Caroline T. v. Hudson Sch. Dist., 915 F.2d 752 (1st Cir. 1990).

[45] 20 U.S.C. § 1414(d)(1)(A)(i).

[46] 20 U.S.C. § 1414(d)(1)(A)(ii).

[47] 20 U.S.C. § 1414(d)(1)(A)(viii)(II).

[48] 20 U.S.C. § 1414(d)(1)(A)(iii).

[49] 20 U.S.C. § 1414(d)(1)(A)(iv).

[50] Lachman v. Illinois State Bd. of Educ., 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988).

[51] 20 U.S.C. § 1412(a)(17).

[52] 20 U.S.C. § 1414(d)(1)(A)(v).

[53] 20 U.S.C. § 1414(d)(1)(A)(vii)(I).

[54] 20 U.S.C. § 1414(d)(1)(A)(vii)(II).

[55] 34 C.F.R. § 300 App. A., Questions 11 and 12.

[56] Because states may provide for the transfer of rights from parent to child at the age of majority, parents may have no standing to pursue litigation under IDEA if their state does grant such provision. *See* Muth v. Carroll, No. 89-0214 (E.D. Pa., June 26, 1990) (finding that parent had no standing to bring an appeal from the decision of the independent hearing officer

on behalf of the child who attained the age of majority prior to the filing of the complaint with the district court); Susan R.M.S. v. Northeast Indep. Sch. Dist., 818 F.2d 455 (5th Cir. 1987) (forecasting that the parent will not have standing to pursue an action on an adult child's behalf under Texas handicap law).

[57] 20 U.S.C. § 1414(d)(1)(A)(vii)(III).

[58] Under FERPA, records rights transfer to the student aged 18 and older; 20 U.S.C § 1232g(d); 34 C.F.R. § 99.5(a).

[59] 20 U.S.C. § 1415(m). (If adjudicated incompetent or unable to give informed consent).

[60] *See, e.g.*, Delaware County Intermed. Unit #25 v. Martin K., 831 F. Supp. 1206 (E.D. Pa. 1993) (requiring the school district to reimburse a family for expenses incurred after they began Lovaas treatments at home while waiting more than six months for the IEP to be developed).

[61] *See, e.g.*, W.B. v. Mantua, 23 IDELR 411 (3d Cir. 1995) (holding that the district violated the IDEA when it failed to identify, evaluate, and serve a student with ADHD and Tourette Syndrome).

[62] Parents have a right to notice of the availability of public hearings and to give input on proposed amendments to state plans, 20 U.S.C § 1412(20).

[63] 20 U.S.C. § 1413(f)(4).

[64] 20 U.S.C. § 1415(b)(37); 34 C.F.R. § 300.504(a).

[65] 20 U.S.C. § 1415(c).

[66] 20 U.S.C. § 1415(b)(4).

[67] 20 U.S.C. § 1415(d)(2)(G).

[68] 20 U.S.C. § 1415(d)(2)(H)

[69] 20 U.S.C. § 1415(a)-(m).

[70] *Lachman*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988).

[71] 20 U.S.C. § 1415(h)(1).

[72] Garcia v. Town of Ridgefield Bd. of Educ., EHR 558:152 (D.D.C. 1986).

[73] 34 C.F.R. § 300.502(c)(1).

[74] 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b).

[75] 34 C.F.R. § 300.502(b)(4).

[76] 34 C.F.R. § 300.502(e).

[77] 34 C.F.R. § 300.502(a)(2).

[78] Florence County Sch. Dist. v. Carter, 510 U.S. 7 (1993).

[79] 34 C.F.R. § 300.453.

[80] 34 C.F.R. § 300.454.

[81] 34 C.F.R. § 300.457.

[82] 20 U.S.C. § 1414 (a)(10)(A).

[83] Doolittle *ex rel.* Doolittle v. Meridian Joint Sch. Dist. No. 2, Ada County, 919 P.2d 334 (Idaho 1996).

[84] 20 U.S.C. § 1415(b)(5); 20 U.S.C. § 1415(e).

[85] 20 U.S.C. § 1415(e)(2)(D).

[86] 20 U.S.C. § 1415(i)(3)(F)(iv).

[87] 20 U.S.C. § 1415(b)(7).

[88] 20 U.S.C. § 1415(k)(4).

[89] 20 U.S.C. § 1415(k)(6)-(7).

[90] 20 U.S.C. § 1415(k)(1)(A)(i).

[91] 20 U.S.C. § 1415(k)(8).

[92] 34 C.F.R. § 300.562; 20 U.S.C. § 1232 (1992).

[93] Schools may retain records including the student's name, address, phone number, grades, attendance, classes taken, grade level completed, and year completed; 34 C.F.R. § 300.573; 20 U.S.C. § 1232g(a)(1)(C)(4)(B).

[94] 20 U.S.C. § 1232g(a)(5)(B); 20 U.S.C. § 1232g(b)(1); 34 C.F.R. § 300.571.

[95] 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 300.567.

[96] 34 C.F.R. § 300.568; 34 C.F.R. § 99, Subpt. C.

[97] 20 U.S.C. § 1232g(a)(2); 34 C.F.R. § 300.569.

[98] However, a parent may bring suit under Section 1983 and Section 1988.

[99] Hawes v. Bates, 24 IDELR 1018 (N.D. Ind. 1996).

[100] 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.504.

[101] 20 U.S.C. § 1414(a)(1)(C), 34 C.F.R. § 300.505.

[102] 34 C.F.R. § 300.500(b)(1)(iii)(B).

[103] 20 U.S.C. § 1414(c)(3).

[104] Scituate Sch. Comm. v. Robert B., 629 F. Supp. 1224 (D.R.I. 1985); *aff'd*, 795 F.2d 77 (1st Cir. 1986).

[105] 34 C.F.R. § 300.24(b)(7).

[106] *Lachman*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988).

[107] 34 C.F.R. § 300.345.

[108] 34 C.F.R. § 300.343.

[109] *See* Gardner v. School Bd. of Caddo Parish, 958 F.2d 108 (5th Cir. 1992); E.H. v. Tirozzi, 735 F. Supp. 53 (D. Conn. 1990); V.W. v. Favolise, 131 F.R.D. 654 (D. Conn. 1990).

[110] *See e.g.*, Caroline T. v. Hudson Sch. Dist., 915 F.2d 752 (1st Cir. 1990).

[111] 34 C.F.R. § 300.345(f).

[112] 20 U.S.C. § 1413.

[113] 20 U.S.C. § 1415.

[114] 34 C.F.R. § 300.500(a)(1); 34 C.F.R. § 300.345(e).

[115] Page v. Rotterdam-Mohonasen Cent. Sch. Dist., 441 N.Y.S.2d 323 (Sup. Ct. 1981).

[116] Fay v. S. Colonie Cent. Sch. Dist., 802 F.2d 21 (2d Cir. 1986).

[117] Under FERPA, records rights transfer to the student aged 18 and older (20 U.S.C. § 1232g(d)), however IDEA qualifies this right dependent on the type or severity of the disability (34 C.F.R. § 300.574).

[118] Florence County Sch. Dist. v. Carter, 510 U.S. 7 (1993).

[119] Burlington Sch. Comm. v. Department of Educ., 471 U.S. 359 (1985).

[120] *See* 20 U.S.C. § 1412(a)(10)(C)(ii); *see also*, Board of Educ. of Avon Lake City Sch. Dist. v. Patrick M., 9 F. Supp.2d. 811, 820 (N.D. Ohio 1998), *quoting* Doe v. Board of Educ. of Tullahoma City Sch., 9 F.3d 455, 458 (6th Cir. 1993), *cert. denied*, 512 U.S. 1108 (1994) ("[P]arents bear the burden of proving by a preponderance of the evidence that the IEP devised by [a school district] is inappropriate."). Assuming that parents meet this initial burden, they must then show that their decision to place the student in a private facility was proper.

[121] Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993).

[122] 20 U.S.C. § 1232g(4)(A).

[123] 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501.

[124] 20 U.S.C. § 1232g(1)(A); 34 C.F.R. § 300.562.

[125] 34 C.F.R. § 300.564.

[126] 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.7.

[127] 34 C.F.R. § 300.567.

[128] 34 C.F.R. § 300.573. (Note that destruction of test protocols denies parent access).

[129] 20 U.S.C. § 1232g(a)(5)(B); 20 U.S.C. § 1232g(b)(1); 34 C.F.R. § 300.571.

[130] 20 U.S.C. § 1232g(b)(2)(A).

[131] 34 C.F.R. § 300.566.

[132] 34 C.F.R. § 300.568.

[133] 20 U.S.C. § 1232g(a)(2); 34 C.F.R. § 500.569.

13

Infectious Diseases

Jennifer A. Sughrue, Richard G. Salmon, and Jean B. Crockett

Introduction

A quiet revolution has occurred in recent years pursuant to public school policies that affect educational services of public school pupils and the employment status of personnel who have become infected with one of several chronic infectious diseases. Prior to the latter 1970s, pupils who contracted chronic infectious diseases often were denied access to educational services while school personnel similarly infected were either terminated or placed on indefinite furloughs. Most persons recognized that school policies that curtailed educational services to infected pupils and suspended employment of personnel were less than compassionate, but such policies were justified on the basis of protecting other children and safeguarding public health. However, federal laws specifically designed to prohibit discrimination against disabled individuals, coupled subsequently with a series of court decisions, have restricted significantly the ability of local school boards and school administrators to alter either the educational services provided pupils or the employment status of their employees. While it is likely other diseases could be classified as both chronic and infectious, current federal case law has been limited primarily to the following diseases: Tuberculosis (TB),[1] Hepatitis B (HBV),[2] and Acquired Immune Deficiency Syndrome (AIDS).[3] To date there have been no federal cases filed pursuant to Hepatitis C (HCV),[4] but this virus is both chronic and infectious, and it is likely that litigation will occur.

In several instances, public school pupils and school personnel suffering from one of the above chronic infectious diseases have complained that their free appropriate public education (FAPE) or employment status, respectively, have been discontinued or altered significantly due to their illnesses. These pupils and employees have contended that they have become disabled as a result of their illnesses and are protected by several federal and state constitutional and statutory provisions. Specifically, plaintiffs have based their complaints upon the following: Section 504 of the Rehabilitation Act of 1973;[5] Individuals with Disabilities Education Act[6] and its predecessor, the Education for All Handicapped Children Act;[7] Americans With Disabilities Act (ADA);[8] due process and equal protection guarantees of the Fourteenth Amendment; and appropriate state constitutional and statutory provisions.

Legal Issues

When determining whether the actions of local school boards and school administrators concerning pupils and school personnel with chronic infectious diseases were proper, courts have relied extensively upon Section 504 of the Rehabilitation Act of 1973. The provisions of Section 504 were patterned after Title VI of the Civil Rights Act of 1964 [9] and were designed specifically to prohibit discrimination against qualified disabled individuals in programs receiving federal fiscal assistance. Detailed regulations were promulgated in 1977 by the then United States Department of Health, Education, and Welfare.[10] This act provided, in part, that, "no otherwise qualified handicapped person...shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving federal financial assistance."[11] A handicapped individual was defined by the Act as a person who had the following: "a physical...impairment which substantially limits one or more of [his or her] major life activities, has a record of such an impairment, or is regarded as having such an impairment.[12] The term physical or mental impairment was defined as:

> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genitourinary; hemic and lymphatic; skin and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[13]

Additionally, major life activities were defined as functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.[14]

The term *qualified individual with a disability* means:

> [A]n individual with a disability who, with or without reasonable accommodation can perform the essential

> functions of the employment position that such individual holds or desires...consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.[15]

Often in conjunction with Section 504 of the Rehabilitation Act of 1973, courts have relied upon the Individuals with Disabilities Education Act (IDEA) and the Americans With Disabilities Act (ADA) of 1990 to determine the propriety of governmental actions. The primary purpose of the IDEA is to provide to the states federal fiscal assistance to partially fund educational services for the disabled. Eligibility for federal fiscal assistance is contingent upon implementation and use of an approved state plan. An essential component of the approved state plan is that a free appropriate public education (FAPE), as outlined in individualized education programs (IEPs), is provided to all disabled children within the geographical boundaries of the local education agencies (LEAs).[16] The Americans with Disability Act (ADA) protects individuals from adverse employment actions.[17] This provision prohibits employers from reassigning a disabled employee to another position as a reasonable accommodation if that reassignment has an adverse effect on the employment status of the employee.

Courts have been asked to determine the validity of governmental actions pursuant to the Fourteenth Amendment of the United States Constitution. Plaintiffs have alleged that they were deprived of certain property rights absent due process and equal protection of the laws. In at least one case, the plaintiff asserted that the contested state action violated his right to equal protection under the law and that strict scrutiny analysis by the court was necessary.[18] Strict scrutiny requires the court to shift the normal burden of proof from the plaintiff to the defendant. Further, the defendant, often the LEA or SEA, has to convince the court that a *compelling reason* exists for the law or regulation to successfully withstand judicial challenge.[19]

Alteration of Employee Status

The limits to which local school boards may alter the employment status of their personnel who are suffering with a chronic infectious disease were set clearly by the United States Supreme Court in the landmark case *Arline v. School Board of Nassau County*.[20] In March 1987, the Court held that a contagious disease such as tuberculosis was a handicapping condition under Section 504 of the Rehabilitation Act of 1973. Gene Arline first contracted TB in 1957 at the age of fourteen. Shortly thereafter, the disease went into remission, and in 1966 she was employed as an elementary teacher in Nassau County, Florida. Arline suffered three relapses and after the third was dismissed in 1978. She brought suit in federal district court, which entered judgment for the defendants. Upon appeal, the Eleventh Circuit reversed and indicated that TB was a contagious disease which constituted a *handicap* within the meaning of the Rehabilitation Act. *Arline* was remanded for further hearing as to whether risks of infection precluded her from being otherwise qualified for the job. The United States Supreme Court granted *certiorari* and affirmed the Eleventh Circuit. *Arline* provides the following interpretation of handicapped individual contained within the Rehabilitation Act: "Arline...had a physical impairment as that term is defined by the [federal] regulations.... This impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment."[21] The defendant school district and the Solicitor General of the United States both acknowledged that Arline qualified as a disabled individual under Section 504 but justified her dismissal because of the threat that her relapses of tuberculosis posed a danger to the health of others.[22] The Court was not persuaded and indicated it would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and effects of a disease on a patient and to use that distinction to justify discriminatory treatment.[23]

The Court remanded *Arline* to the district court with specific directions to determine, through individual inquiry, whether Arline was otherwise qualified for the job of elementary school teacher.[24] The Court indicated that the inquiry should include the following:

> Findings of fact-based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.[25]

The Court also relied upon the *Southeastern Community College v. Davis* case which indicated that an otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap.[26] In the employment setting, the otherwise qualified person is one who can perform the essential functions of the job or a different job after reasonable accommodation has been made.[27] In order for the accommodation to be judged unreasonable, the Court indicated,"...it either imposes undue financial and administrative burdens...or requires a fundamental alteration in the nature of [the] program."[28]

The Court relied extensively upon expert medical opinion and recommended strongly that lower courts should defer to the reasonable medical judgments of public health officials.[29] Upon remand, the district court ruled that Arline was entitled to full back pay, plus benefits. In addition, the court ordered the school district to either reinstate Arline or to compensate her at full salary until her scheduled retirement at age 65.[30]

Following *Arline*, the Ninth Circuit, in *Chalk v. United States District Court Central District of California*,[31] addressed the alteration of the employment status of a classroom teacher who had contracted AIDS. Vincent L. Chalk brought suit against the California Department of Education, alleging that his removal from classroom teaching and his subsequent assignment to administrative duties violated Section 504 of the Rehabilitation Act. Specifically, Chalk charged that he was a disabled individual under Section 504 which prohibited discrimination of otherwise qualified persons. The district court denied motion for preliminary injunction, and he appealed. The circuit court issued an order reinstating Chalk to classroom duties holding that, "the teacher was not required to disprove every theoretical possibility of harm, and the possibility that Chalk's return to teaching would produce fear and apprehension in parents and pupils was not sufficient grounds to deny preliminary injunction."[32] While the circuit court adhered to *Arline*, it also acknowledged that it was difficult for employers facing the possibility of chronic infectious diseases to reconcile the following objectives: protect other persons; continue the work mission; and accommodate disabled and otherwise qualified persons. In order to reconcile these objectives, the court provided the following guidelines:

> A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk. The Act would not require a school board to place a teacher with active, contagious tuberculosis in a classroom with elementary school children.[33]

In *Doe v. Dekalb County School District*,[34] a special education teacher who was HIV-positive filed suit against his school district when the district attempted to reassign him from his psychoeducation classroom to an interrelated classroom. Psychoeducation classrooms serve those students with the most severe behavioral disorders, including aggressive behavior. Students in an interrelated classroom have mild behavioral disorders and are often placed in regular education classrooms. Although the plaintiff teacher lacked appropriate certification for the interrelated classroom, the school district offered to pay all costs associated with re-certification. The teacher was unwilling to accept reassignment and filed suit, claiming adverse employment action in violation of ADA. The district court granted a permanent injunction barring the teacher's reassignment, but the Eleventh Circuit overturned the lower court's decision and remanded the case to the trial court. The circuit court gave specific directions to the district court to enter explicit findings of fact concerning the alleged adverse nature of the plaintiff's transfer. More importantly, the circuit court indicated that whether the transfer was voluntary or involuntary is not relevant to the issue of whether the action was unlawfully adverse. Further, the district court failed to make explicit findings of fact regarding any damages that Doe's illness might pose to violent psychoeducation students. Finally, the district court erred by applying a subjective standard for determining whether Doe's transfer was adverse.

New Alteration of Instructional Service

In *New York State Association for Retarded Children, Inc. v. Carey*,[35] the federal district court addressed the issue of segregating within the public school certain mentally-retarded children who were classified as carriers of HBV. Immediately prior to implementation of a plan to integrate children with mental retardation in special education classes, approximately 50 of them were diagnosed as carriers of HBV and summarily excluded from their public school special education classes. In response to an injunction that prohibited the exclusion of the children identified as carriers of HBV, the school board proposed that these children be reassigned to newly created classes composed entirely of HBV carriers. Although the New York City Health Department supported the plan to isolate the carriers of HBV, the district court disagreed.

> The medical evidence upon which the proposal is based is sparse and fails to demonstrate any causal relationship between the classroom setting and transmission of the virus...the inability of the Board to offer any evidence of even one instance of actual transmission of the virus within the classroom setting, despite the fact that many

> of these carrier children have been attending public schools for several years.[36]

The court ruled that the segregation of children identified as carriers of HBV violated Section 504 of the Rehabilitation Act, the Education of All Handicapped Children Act, the Fourteenth Amendment of the United States Constitution, and certain New York statutes.

In *Thomas v. Atascadero Unified School District*,[37] a federal district court held that a child infected with AIDS was both handicapped and otherwise qualified to attend regular kindergarten classes pursuant to Section 504 of the Rehabilitation Act. Five-year-old Ryan Thomas became infected with the AIDS virus as an infant due to a contaminated blood transfusion. Initially, Thomas was admitted to public school kindergarten but later removed after an altercation with one of his classmates. In the skirmish, Thomas bit another child, although no skin was broken. Thomas' parents objected to the offer by the school district to provide home tutoring and brought action to require that he be allowed to attend regular kindergarten classes. In weighing the risk of AIDS infection to other children against the potential damage to Thomas by excluding him from school, the court relied extensively upon the published reports by the United States Centers for Disease Control and other medical documents concerning the transmission of the disease.

> The overwhelming weight of medical evidence is that the AIDS virus is not transmitted by human bites, even bites that break the skin. Based upon the abundant medical and scientific evidence before the Court, [Thomas] posed no risk of harm to his classmates and teachers. Any theoretical risk of transmission of the AIDS virus by [Thomas] in connection with his attendance in regular kindergarten class was so remote that it could not form the basis for any exclusionary action by the School District.[38]

Recent IDEA regulations address the placement of students identified with severe behavior disorders. If such an identified student has a health condition that creates an *actual risk of contagion* to other students, that student may be placed in a setting in which the risk is minimized.[39]

In the highly publicized *Ray v. School District of DeSoto County* case,[40] the federal district court issued an injunction that barred the school district from either segregating or providing homebound instruction to three pupils infected with the AIDS virus. Richard, Robert, and Randy Ray, hemophiliacs, became infected with the

AIDS virus as a result of contaminated blood transfusions. Their parents voluntarily notified school authorities that the boys were infected by the AIDS virus. The school district immediately removed the three children from the regular school setting and provided homebound instruction. The parents objected and alleged violations of Section 504 of the Rehabilitation Act, the Fourteenth Amendment of the United States Constitution, and appropriate state constitutional and statutory provisions. The court acknowledged *Arline* again, relying extensively upon expert advice from the medical profession.

> Extensive and numerous studies have found consistently no apparent risk of HIV-infection by individuals exposed through close, non-sexual contact with AIDS patients. These studies have demonstrated that contact involving sharing of household items, such as toothbrushes, eating utensils, and baths or toilets, do not lead to HIV-infection. Similarly, there is no evidence that close personal, but non-sexual interaction, such as giving a bath, shaking hands or kissing on the lips, will cause HIV-infection.[41]

Indicating that it was obligated to accept medical science as currently available, the court said, "decisions cannot be based upon speculation of what the state of medical science may be in the future, no matter how close that future may be...."[42] The court held that irreparable injury was being caused the Ray children by excluding them from the regular school program. "[T]he actual, ongoing injury to [the Ray children]...clearly outweighs the potential harm to others, and the public interest in this case weighs the potential harm to others, and the public interest in this case weighs in favor of returning these children to an integrated classroom setting."[43]

In *Kohl v. Woodhaven Learning Center*,[44] the federal district court held that an HBV carrier who had a history of biting and scratching was an otherwise qualified applicant for residential services in a life-skills and living quarters facility. Kohl, a 31-year-old, mentally-retarded and visually-impaired man with behavioral problems, applied for residential and training services in the Woodhaven Learning Center, a private, nonprofit corporation that received federal financial assistance. Kohl was denied admission because he was a carrier of HBV and funds were not available to inoculate the residential staff. The court ruled that Kohl was a disabled individual within the meaning of Section 504 of the Rehabilitation Act and used the *Arline* test to determine whether he was otherwise qualified. The court found that inoculating and screening limited numbers of employees would not have imposed undue financial burden on the defendants and ordered injunctive and declaratory relief. However, upon appeal to the Eighth Circuit, the case was reversed and remanded.[45] The circuit court ruled that limited inoculation of staff would not eliminate all significant risks, and Kohl could not be reasonably accommodated at Woodhaven. The United States Supreme Court denied *certiorari*.[46]

In *Parents of Child v. Coker*,[47] the district court ruled that a pupil classified as emotionally disabled and a carrier of the HIV virus was entitled to placement in a special education class for students with emotional and behavior disorders. The court based its decision upon the Education for All Handicapped Children Act (now IDEA) that created a right to a free appropriate public education (FAPE).[48] The placement team considered the totality of the child's condition, including the fact that he had tested HIV positive when the initial placement was made. Later, the child was removed from the specialized setting; subsequently, his parents filed suit. The defendants justified removal of the child on the basis of a state statute regarding contagious diseases. The court denied attempts by one defendant, the Concerned Parents Association, to admit evidence regarding the contagiousness of AIDS as an error in the original placement.

> [T]he State of Oklahoma stands in the place of, for example, a group such as the Concerned Parents Association. It would render the administrative procedure established by Congress superfluous to permit such relitigation...because of his emotional disability, this Court need not address the issue of whether AIDS constitutes such a handicap.[49]

The court also noted that when a state accepts federal funds, it accepts limitations or restrictions on state statutes or regulations which conflict with the federal statutes.

In *Robertson v. Granite City Com. Unit School District 9*,[50] the district court ruled that while a seven-year-old hemophiliac with AIDS was not disabled within the meaning of the Education of All Handicapped Children Act, he was disabled pursuant to the Rehabilitation Act. The court held that the placement of Jason Robertson in a modular classroom violated Section 504. Initially, Robertson was enrolled in a homebound program. However, upon his mother's request that he be enrolled in a regular classroom, he was placed in a modular classroom where he was the only pupil. The court found that irreparable harm would result from the continued placement of

Robertson in such a setting. "[I]t is difficult…[to] imagine anything more traumatic for a child than going to school and being placed in a classroom by himself, not being allowed to play with other children, and not even allowed to eat with his classmates."[51]

In *Martinez v. School Board of Hillsborough County*,[52] the district court held that the placement of Eliana Martinez, a six-year-old trainable mentally-handicapped pupil infected with the AIDS virus, in a homebound program was reasonable and appropriate. Martinez, who was incontinent, was classified as Trainable Mentally Handicapped (TMH), but due to her infection with AIDS, she was enrolled in a homebound program. The court declined to grant an injunction and ruled that, "the specific potential harm to others, [and specifically the population of the trainable mentally handicapped (TMH) classroom], outweighs the interests of the plaintiff."[53] However, upon reconsideration requested by the plaintiff, the court found that the placement of Martinez in homebound instruction violated both Section 504 of the Rehabilitation Act and the Education for All Handicapped Children Act. The court acknowledged that the risk of transmittal of the AIDS virus to other children was too great to place Martinez in an unrestricted TMH classroom. The court ruled that a restricted placement is the appropriate least restrictive environment for Martinez.[54] In an attempt to achieve a balance, the court ordered the school district to construct a separate classroom for Martinez within the confines of the TMH classroom. On appeal, the Eleventh Circuit vacated the order and remanded the case to the district court.[55] Following the instructions of the circuit court, the district court held that the child with AIDS was otherwise qualified to attend class with other trainable mentally-handicapped children. The court ruled that the overall risk of transmission from all bodily substances, including blood in the saliva, did not raise significantly the risk of infection transmission.[56] The court ordered that Martinez be readmitted to the TMH classroom in order that she may "sit at a desk alongside other mentally-disabled children her age."[57]

The issue of appropriate placement also was addressed in *Doe v. Belleville Public School District No. 118*.[58] Johnny Doe, a six-year-old hemophiliac infected with the AIDS virus, began first grade in School District No. 118. Upon notification that the child was HIV-positive, the school district developed a policy, which resulted in his placement with a home tutor. Finding that the student did not suffer from limited strength or lack of vitality or alertness that would interfere with his educational performance, the court indicated that Section 504 of the Rehabilitation Act was applicable and ordered the school district to admit Doe to the regular classroom.

In a similar case, *Doe v. Dolton Elementary School District No. 148*,[59] the district court ruled that the removal of a 12-year-old pupil with AIDS from the regular classroom and his subsequent transfer to homebound instruction also violated Section 504 of the Rehabilitation Act. In still another case, *Child v. Spillane*,[60] a child with AIDS was removed from kindergarten in November 1987 when the parent informed the school district that the county health department had recommended that the child be excluded from school pending a review of pertinent medical records. A medical committee was formed to review and evaluate whether the infected child would pose a risk to other students and school employees. Based upon Section 504 of the Rehabilitation Act, a suit was filed requesting that the court order the school district to readmit the infected child. Subsequently, the medical committee informed the school board that the child did not pose a significant risk and recommended readmission. The child was readmitted and action was withdrawn.

The issue of privacy of students who have tested positively for AIDS also has attracted attention from the courts. In *Child v. Spillane*,[61] parents of a child with AIDS withdrew their daughter from a public elementary school in protest over the district's notification policy regarding students who have tested positively for AIDS. The parents believed that their child's identity had been discovered, and as a consequence, removed her from school. The parents alleged the child's rights were violated under the Family Education Rights and Privacy Act[62] and filed suit in federal district court. The district court disagreed, however, and indicated that the child's identity clearly was not traceable. The decision was affirmed by the Fourth Circuit.[63]

Recommendations for Practice

The courts consistently have ruled that public employees and pupils infected with a chronic infectious disease fall within the meaning of disabled individuals under Section 504 of the Rehabilitation Act. In some instances, the IDEA has been used as the basis for litigation. However, in order for the IDEA to apply, a plaintiff will have to show that the illness adversely affects a child's educational performance.[64] Plaintiffs also have based their complaints upon the Fourteenth Amendment of the United States Constitution and applicable provisions of their respective state constitutions and statutes. The federal case law has been limited primarily to the following chronic infectious diseases: Tuberculosis (TB); Hepatitis B (HBV); and Acquired Immune Deficiency Syndrome (AIDS). Although the leading case, *Arline*, regarding the alteration of employment status of school personnel, dealt with TB; most of the cases concerning pupils have involved AIDS. The following recommendations for administrative practice can be made.

- Prior to the alteration of the status of employees, the agency receiving federal financial assistance is obligated to determine whether the individual is otherwise qualified. An otherwise qualified individual is one who is able to meet all of a program's requirements despite his or her disability. In the context of employment, an otherwise qualified person is one who can perform essential functions of the job in question. The 1992 Amendments to the Rehabilitation Act require the employer to reasonably accommodate or reassign the employee.[65] However, the employer will not be required to incur undue financial and administrative burdens or implement a fundamental alteration in the nature of the program in order to comply with reasonable accommodation.[66] The United States Supreme Court, in the landmark *Arline* decision, outlined a procedure to be used by courts in determining whether a disabled individual was otherwise qualified. In brief, courts are required to conduct individual inquiries based upon reasonable medical opinions concerning risk, duration of risk, severity of the disease, and the probability of transmittal of the disease.
- A series of decisions of the federal judiciary regarding the alteration or discontinuation of instructional services for disabled pupils with chronic infectious diseases consistently have required the public schools to provide a free appropriate public education in the least restrictive environment.[67] Often, the cases have occurred because the children with chronic infectious diseases have been transferred from regular or special education classroom settings to homebound instruction programs or isolated instructional environments. The courts have relied primarily upon the medical advice to discount the fears and apprehensions of the communities regarding the contagious nature of AIDS.
- As stated above, children with chronic infectious diseases have to be afforded a free appropriate public education, and as a consequence, must be provided procedural safeguards. This system of procedural safeguards includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.[68]
- Due to the volatile nature of the chronic infectious diseases issue, confidentiality of student records has to be assured.

While Section 504 of the Rehabilitation Act contains no provision regarding confidentiality, other federal laws including the Family Education Rights and Privacy Act[69] are applicable. In essence, children suffering from a chronic infectious disease have the same right to confidentiality as other children. Access to student files, including medical records, should be restricted to those persons who have a legitimate educational or medical reason to view such information.

References

[1] Tuberculosis (TB) is a communicable disease...caused by a microorganism (Mycobacterium tuberculosis) and manifesting itself in lesions of the lung, bone, and other parts of the body. See Cowley, Leonard, & Hager, *Tuberculosis—A Deadly Return,* CXIX(11), Newsweek 52-57, March 16, 1992. (The medicines given to people with TB disease usually stop them from spreading the TB bacteria within a few weeks but they must be monitored regularly by a physician in order to determine whether they remain infectious).

[2] Hepatitis B (HBV), formerly called serum hepatitis, is a disease for which there is no known cure...it is of limited communicability, though an increased risk of transmission is generally associated with crowded, often unhygienic conditions found in institutions. In the United States it is spread predominantly through sexual contact but may be transmitted through seminal fluid, vaginal secretions, breast milk, tears, saliva, and open sores. *See* A.D.A.M. Internet Health Inc. "Excite. Health," Excite.Health.com, 1999.

[3] Acquired Immune Deficiency Syndrome (AIDS) is the clinical manifestation of a dysfunction of the human immune system caused by a virus....To date there is not a vaccine against or cure for AIDS...the virus is transmitted among persons by infected blood, semen, or vaginal fluids. *See* Thomas v. Atascadero Unified School District, 662 F. Supp. 376 at 379 (1987).

[4] Hepatitis C (HCV), often referred to as the *silent epidemic*, is much more likely to become chronic than the other forms of hepatitis. Hepatitis C, in combination with Hepatitis B, now accounts for seventy-five percent of all cases of liver disease throughout the world. Hepatitis C is the most deadly of the several hepatitis diseases, and liver failure due to Hepatitis C is the leading cause of liver transplants in the United States. *See* A.D.A.M. Internet Health, Inc. "Excite. Health," Excite.Health.com, 1999.

[5] 29 U.S.C § 794.
[6] 20 U.S.C § 1400 *et. seq.*
[7] 20 U.S.C §1400 *et. seq.*
[8] 42 U.S.C §§ 12112-12114.
[9] 42 U.S.C § 2000(d).
[10] 45 C.F.R § 84.4(a).
[11] *Id.*
[12] 29 U.S.C §706(8)(B).
[13] 45 C.F.R § 84.3(j)(2)(i).
[14] 45 U.S.C § 84.3(j)(2)(i).
[15] 42 U.S.C.A § 12131(2).
[16] *Supra.*, note 5.
[17] 29 U.S.C.A § 791.
[18] *See* New York State Assn. for Retarded Children, Inc. v. Carey, 466 F. Supp. 487, 504 (1979).
[19] K. ALEXANDER and M. D. ALEXANDER, 5th Edition, AMERICAN PUBLIC SCHOOL LAW. Minneapolis: West Publishing Company, 2001.
[20] Arline v. School Bd. of Nassau County, 107 S. Ct. 1123 (1987).
[21] *Id.* at 1127.
[22] *Id.*, at 1128.
[23] *Id.*
[24] *Id.*, at 1131.
[25] *Id.*, at 1131.
[26] Southeastern Community College v. Davis, 442 U.S. 397 at 406 (1979).
[27] *Arline*, 107 S. Ct. 1123 at 1131 (1987).
[28] *Id.*, for additional clarification on reasonable accommodation and undue financial and administrative hardship, *see also* Shiring v. Runyon, 90 F.3d 827 (1996).
[29] *Id.*
[30] *Arline*, 692 F. Supp. 1286 (1988).
[31] Chalk v. United States Dist. Court Central Dist. of California, 840 F.2d 701 (1988).
[32] *Id.*, at 701.
[33] *Id.*, at 705.
[34] Doe v. Dekalb County Sch. Dist., 145 F.3d 1441 (1998).
[35] *Carey*, 466 F. Supp. 487 (1979).
[36] *Id.*, at 499.
[37] Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (1987).
[38] *Id.*
[39] P.A. ZIRKEL, *Overdue Process Revisions for the Individuals with Disabilities Education Act*. 55 MONT. L. REV. 403 (Summer, 1994).

[40] Ray v. School Dist. of DeSoto County, 666 F. Supp. 1524 (1987).
[41] *Id.*, at 1530-1531.
[42] *Id.*, at 1529.
[43] *Id.*, at 1535.
[44] Kohl v. Woodhaven Learning Ctr., 672 F. Supp. 1226 (1987).
[45] *Kohl*, 865 F.2d 930 (1989).
[46] *Kohl*, 493 U.S. 892 (1989).
[47] Parents of Child v. Coker, 676 F. Supp. 1072 (1987).
[48] 34 C.F.R § 104.33(a).
[49] *Coker* 676 F. Supp. 1072 at 1075 (1987).
[50] Robertson v. Granite City Com. Unit Sch. Dist. 9, 684 F. Supp. 1002 (1988).
[51] *Id.*, at 1005.
[52] Martinez v. School Bd. of Hillsborough County, 675 F. Supp. 1574 (1987).
[53] *Id.*, at 1582.
[54] *Martinez*, 692 F. Supp. 1293 (1988).
[55] *Martinez*, 861 F.2d 1502 (1988).
[56] In contrast to the education-related cases, criminal courts have been much less understanding. *For example*, Curtis Weeks was convicted of attempted murder because he twice spit on a prison guard during Week's incarceration. Prior to the actual spitting incident, Weeks had become increasingly more agitated and physically violent. He threatened the guards by indicating that he was going to "dog" the officers and was going to cut one of the bosses' heads off. Weeks v. Scott, 55 F.3d 1059 at 1061 (1995).
[57] *Martinez*, 711 F. Supp. 1066 (1989).
[58] Doe v. Belleville Public Sch. Dist. No. 118, 672 F. Supp. 342 (1987).
[59] Doe v. Dolton Elementary Sch. Dist. No. 148, 694 F. Supp. 440 (1988).
[60] Child v. Spillane, 866 F.2d 691 (1989).
[61] Child v. Spillane, 875 F.2d 314 (1989) Although similarly named, this case is a different case than previously discussed.
[62] 20 U.S.C. § 1232(g).
[63] Child v. Spillane, 875 F.2d 314 (1989).
[64] 34 C.F.R. § 300.5(b)(7).
[65] 29 U.S.C. § 794(d).
[66] *Shiring*, 90 F.3d 827 (1996).
[67] 34 C.F.R. § 104.33(a).
[68] 34 C.F.R. § 104.36.
[69] 29 U.S.C. § 794.

14

Barrier-Free Facilities

Ralph D. Mawdsley

Introduction

Establishment and maintenance of barrier free schools were, until 1991, the sole responsibilities of the United States Architectural Transportation Barriers Compliance Board (ATBCB). Created by Section 502 of the Handicapped Act,[1] the ATBCB used sections of the Rehabilitation Act[2] to resolve violations of the Architectural Act.[3] Prior to passage of the Americans with Disabilities Act (ADA),[4] the Architectural Barriers Act was the medium for declaring accessibility standards, but much of its function has been taken over by the ADA. However, since ADA did not invalidate other federal laws,[5] the ATBCB can still conduct investigations, hold public hearings, and issue orders to insure compliance with the provisions of the Architectural Barriers Act.[6]

The ADA has imposed exhaustive requirements for accommodating the needs of persons with disabilities in terms of all new construction after January 26, 1993 and alterations to existing facilities after January 26, 1992. Title II of ADA,[7] which applies to public entities, covers all public schools,[8] while Title III,[9] which applies to public accommodations, covers all private schools,[10] except those controlled by religious organizations.[11] ADA places responsibility for enforcement of the Act on the Attorney General and the Department of Justice.[12]

Legal Issues

Section 504 of the Rehabilitation Act requires that federally assisted programs and activities be readily accessible to and usable by individuals with disabilities. ADA requires that alteration of facilities be made if the modifications are readily achievable, that is, able to be accomplished easily and without much difficulty or expense. In addition, ADA does not off-set the obligations under other federal or state laws, and state tort claims conferring greater remedies are clearly not preempted by ADA.[13] ADA applies to all new construction where the first occupancy occurred after January 26, 1993 or to alterations of existing facilities after January 26, 1992, but the statute does not apply to claims that arose prior to those dates.[14]

Generally, new construction must meet all of the ADA requirements except where full compliance would be "structurally impracticable," a term that will apply "only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features."[15] Regarding alterations, ADA uses two important concepts, primary function and accessible route, to determine the applicability of the statute. A primary function is a major activity for which the facility is intended[16] and an accessible route is a continuous unobstructed path connecting all accessible elements and spaces of a building or facility and includes both interior and exterior routes.[17] Primary function is determined as follows:

> An alteration that affects or could affect the usability of or access to an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and restrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, unless such alterations are disproportionate in terms of the cost and scope (as determined under criteria established by the Attorney General).[18]

ADA imposes responsibilities on anyone in interstate commerce to make alterations to existing facilities that make them readily accessible to and usable by individuals with disabilities. Readily accessible is further defined as:

> Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. Normal maintenance, reroofing, painting or wall papering, asbestos removal, changes to mechanical and electrical systems are not alterations unless they affect the usability of the building or facility.[19]

Both ADA and the Architectural Barriers Act reference the standards published by the American National Standards Institute (ANSI). The ANSI standards are the basis for the Uniform Federal Accessibility Standards (UFAS) published in the Federal Register.[20] ANSI is a private, national organization which has published recommendations on a wide range of subjects. The basic ANSI standards for barrier-free design are ANSI A117.1-1980 with the most recent modifications found in ANSI A117.1-1987. The ANSI standards are entitled "American National Standards for Buildings and Facilities-Providing Accessibility and Usability for Physically Handicapped People."[21] ADA has published its own complete set of standards and, generally, these standards are the same as those of ANSI A117.1-1980.[22] For purposes of educational institutions, the exceptions deal with accessibility in new and altered construction for such items as parking places, toilets, telephones, and assembly areas.[23] To the extent that ADA standards differ from ANSI, the ADA standards prevail.

Specifications

Even with some differences between ADA and ANSI standards, ANSI is still the single most important and complete document of facility accessibility, in part because the ADA regulations follow ANSI, and in part because ANSI minimum guidelines are referenced in most state building codes.[24] ANSI standards have essentially achieved uniformity with UFAS: ANSI is basically a resource for design specifications and leaves to the enforcing agency the application of criteria such as where, when, and to what extent such specifications apply.[25] The purpose of the ANSI standards is to enable "persons with disabilities to achieve independence...[so they] can live, study, work, and participate in other community activities, fully developing their human potential...."[26] ANSI standards represent the collaborative effort of 53 different organizations as diverse as the American Association of Retired Persons, American Foundation for the Blind, American Hotel/Motel Association, American Society of Plumbing Engineers, Builders Hardware Manufacturers Association, National Conference of State on Building Codes and Standards, National Restaurant Association and nine different federal agencies and cabinet-level departments.[27]

ANSI standards have been designed to deal with a wide range of physical disabilities such as, "the inability to walk, difficulty walking, reliance on walking aids, blindness and visual impairment, deafness and hearing impairment, incoordination, reaching and manipulation disabilities, lack of stamina, difficulty interpreting and reacting to sensory information and extremes of physical size."[28] The specifications remain the same "whether they are applied to new construction, remodeling, alteration or rehabilitation"[29] and will be the appropriate standard to the extent they have not been modified by ADA. ANSI standards are intended to be used in conjunction with other American National Standards: Safety Code for

Elevators and Escalators,[30] Power Operated Pedestrian Doors,[31] and Power Assist and Low Energy Operated Doors.[32] A complete comparative listing of all topics addressed in graphics and dimensions in ANSI standards and ADA reveal that the concern of accessibility in both, despite some differences, is one of function rather than location, be it school, hotel, or manufacturing plant.[33] Other topics include space allowances and reach ranges (e.g., wheel chair turning space, forward reach, side reach); accessible route (e.g., passing space, headroom, slope, egress); protruding objects; ground and floor surfaces; parking spaces and passenger loading zones; curb ramps; stairs; elevators; platform lifts; windows; doors; entrances; drinking fountains and water coolers; water closets; toilet stalls; urinals; lavatories; sinks and mirrors; bathtubs; shower stalls; storage; grab bars and tub shower seats; control and operating mechanisms; alarms and detectable warnings; signage; telephones; seating, tables, and work surfaces; auditorium and assembly areas; and dwelling units.[34]

In addition, states can and have made valuable contributions to ANSI standards.[35] Modifications of the standards to suit children is one area of interest. Specifications in both ANSI and ADA "are based upon adult dimensions and anthropomorphics,"[36] but federal regulations permits modifications "concerning the age groups of the individuals who will use the buildings or equipment."[37] The areas of UFAS affected by the standards for children are: space allowance and reach range of 20 inches; parking and passenger loading zones with the loading zones protected from weather; ramps with handrails the same height as ramps; elevators with changes in the distance of call buttons, car controls, and emergency communications above the floor; drinking fountains and water closets with varying distances for grab bars, toilet seats, flush controls and dispensers; urinals placed 32 inches above the floor; shower stalls with modified height of seats and controls; storage including shelves and hooks placed a maximum of 36 inches above the floor; signs placed 40 inches above the floor; telephones at a 36-inch maximum above the floor; seating, tables, and work surfaces with varying heights for chairs, knee clearance and work surfaces; restaurants and cafeterias with a percentage of fixed seating or tables for handicapped and height of tray slides; libraries with a maximum reach of 36 inches for card catalogs, magazine displays, dictionary stands and reference stacks; locker rooms and gymnasium lockers with locker shelves and hooks a maximum of 26 inches above the floor and lockers with minimum 28-inch openings; classrooms including wall-mounted objects like pencil sharpeners, light switches, and black-boards having a centerline maximum height of 36 inches above the floor.[38]

Enforcement

The ADA provides a private cause of action as well as investigations by the Department of Justice and suits by the Attorney General.[39] However, architects cannot be held liable for failure to design and construct in accordance with ADA.[40] Even with enforcement of the rights of the disabled under ADA, a significant remedy continues to exist under Section 504 of the Vocational Rehabilitation Act.[41] But, since ADA is based on the Interstate Commerce Power[42] while Section 504 applies only to institutions, organizations, or persons receiving federal assistance,[43] ADA will become the major enforcement device for private institutions not receiving federal assistance.[44] Both Section 504 and ADA have broad provisions prohibiting denial of the enjoyment of benefits, goods, services, privileges, advantages, or accommodations.[45]

In program accessibility, both Section 504 and ADA distinguish between existing facilities and new construction. Alterations under ADA have been discussed earlier.[46] Under Section 504, "existing facilities can be viewed in [their] entirety...[as to whether they are] readily accessible to and usable by handicapped persons."[47] It is not necessary in making alterations "to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons."[48] Structural changes are not required to existing facilities "where other methods are effective in achieving compliance...."[49] In new construction, "[e]ach new facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility is readily accessible to and usable by handicapped persons...."[50] Where alterations are made to existing facilities, they shall "to the maximum extent feasible, be made in an accessible manner."[51]

Litigation can arise in a variety of settings where facilities do not meet the requirements of Section 504 or ADA. In many cases, lawsuits have arisen because school districts have failed to take steps to make certain that existing facilities being used by the districts are barrier-free. Two cases illustrate the kinds of violations that can be litigated. A public school district violated both Section 504 and ADA where an existing theater at which the district's graduation programs were conducted was not accessible to and usable by persons with disabilities and the district had failed to provide notice insuring that interested persons, including those with impaired vision or hearing, could obtain information as to the existence and location of graduation services, activities, and facilities that would be accessible to and usable by persons with disabilities.[52] Another school district violated both statutes when it conducted programs and activities on an elementary school's existing stage and playground that were inaccessible to and unusable by persons with disabilities, insofar as 1) the only route to the stage was by stairs, 2) there was no wheelchair-traversable routes connecting the school building's exit doors to the roadway adjacent to the playground, and 3) there was no surface area within the playground that was accessible to or usable by a student using a wheelchair.[53]

Both Section 504 and ADA are clear that alterations to existing facilities need not be made if they would be too expensive. The issue of cost, however, is an affirmative defense for the educational institution. In an action by a disabled high school student alleging that the school was inaccessible to her, the school district was not required to incur expenses to demonstrate that facility alterations would result in undue financial burdens, but, rather, was entitled to raise the financial burden in remedying architectural barriers to make the school accessible to students with wheelchairs as an affirmative defense.[54]

Employee complaints of any form of disability discrimination are handled by the Equal Employment Opportunity Commission (EEOC) and can result in litigation if a negotiated settlement is not possible.[55] Under ADA, the Department of Justice can also investigate discrimination.[56] In the case of accessibility for students or employees under the Architectural Barriers Act, investigations are handled by the ATBCB which can hold administrative hearings and issue compliance orders as well as withhold or suspend federal funds.[57]

Since all states now have barrier-free legislation, the responsibility for assuring accessibility has been a state and local matter. Enforcement of disability accessibility can include review of all building designs by state building officials,[58] refusal to issue a certificate of occupancy,[59] and disciplinary actions against licensed architects who fail to incorporate disability access into building design.[60] Unfortunately, state enforcement of accessibility requirements can be erratic, inconsistent, and perhaps even nonexistent.[61] More viable remedies for the physically disabled persons would be filing a complaint with the state's Human Rights Commission or filing a lawsuit seeking injunctive relief to compel compliance, damages and attorneys' fees.[62] If the state Human Rights Commission is not effective in addressing complaints, other state remedies may be curtailed or be illusory if the Human Rights Act prohibits private causes of action to enforce the statute.[63]

In addition to state and federal standards, some larger cities may have separate accessibility guidelines. A state may leave enforcement to local officials,[64] a practice which can create problems of enforcement by those without experience or expertise[65] or with differing interpretations of identical code sections.[66] However, if the facility has been built with federal funds, another and perhaps better option would be to file a complaint with the ATBCB.[67]

Recommendations for Practice

School officials are well advised to check their statewide building code, as well as the ADA, regarding disability accessibility before altering existing facilities or constructing new ones. Alarmist fears of excessive escalation in building costs to achieve accessibility have largely been just that—unsubstantiated fears.[68] School officials need to examine building codes carefully for key elements to determine whether:

- the scope of renovations requires compliance with accessibility,
- the standard for accessibility has been published,
- the district has an established approval process for determining compliance with accessibility,
- a variance is necessary for intended alterations or new construction,
- employees are adequately instructed in the importance of maintaining an "accessible route" under ADA.

References

[1] 29 U.S.C. § 792(b)(1).
[2] 29 U.S.C. § 794.
[3] 42 U.S.C. §§ 4151-4171. For a discussion of early cases under this Act, *See* GOLDMNA, *Architectural Barriers: A Perspective on Progress*, 5 W. NEW ENG. L. REV. 466 (1983).
[4] 42 U.S.C. §§ 12101-12213.
[5] 56 Fed. Reg. § 36.103(b).
[6] 29 U.S.C. §§ 792(d)(1) and 792(e)(2)(3).
[7] 42 U.S.C. §§ 12131-12150.
[8] 42 U.S.C. § 12131(1).
[9] 42 U.S.C. §§ 12181-12189.
[10] 42 U.S.C. § 12182(a).
[11] 42 U.S.C. § 12118.
[12] 56 Fed. Reg. 35602-35603 §§ 36.501-503.

[13] *See* Gaither v. Barron, 924 F. Supp. 134 (M.D. Ala. 1996) (in dismissing ADA claim of harassment, the court observed that the plaintiff may have had state civil and criminal claims).

[14] *See* State *ex rel.* Human Serv. Dep't v. Penny J., 890 P.2d 389 (N.M. Ct. App. 1994).

[15] 36 C.F.R. § 4.1.1(5).

[16] 56 Fed. Reg. 35600 (§ 36.403(b)).

[17] 36 C.F.R. § 3.5.

[18] 36 C.F.R. § 4.1.6.(K)(2).

[19] 36 C.F.R. § 3.5.

[20] 14 C.F.R. §§ 10;1-10.603.

[21] 49 Fed. Reg. 31528-31617, August 7, 1984.

[22] 36 C.F.R. § 1.

[23] *See* 36 C.F.R. §§ 4.1.1-4.1.7.

[24] *See Access to Buildings and Equal Employment Opportunities for the Disabled: A Survey of State Statutes*, 50 TENN. L.Q. 1067 (1977).

[25] American National Standard for Buildings and Facilities-Providing Accessibility and Usability for Physically Handicapped People 3 (ANSI A117.1-1986).

[26] *Id.*

[27] For complete list, *see Id.* at 4.

[28] *Id.* at 11.

[29] *Id.* at 12.

[30] ANSI/ASME A17.1-1984.

[31] ANSI/BHMA A156.10-1985.

[32] ANSI/BHMA A156.19-1984.

[33] ADA regulations 5-14 are different from ANSI A117.1 in their entirety and address the following areas: Restaurants and Cafeterias; Medical Care Facilities; Business, Mercantile and Civic Libraries; Accessible Transient Lodging; Transportation Facilities; Judicial, Regulatory and Legislative Facilities; Detention and Correctional Facilities; Accessible Residential Housing; and Public Rights-of-Way.

[34] *See generally*, the ADA regulations at 36 C.F.R. §§ 4.2-4.35 which are identical with ANSI A117.1-1980.

[35] ADA regulations are clear that Congress did not intend to displace any of the rights or remedies provided by federal or state law that provide greater or equal protection to individuals with disabilities. 56 Fed. Reg. 35593 (§ 36.103), July 26, 1991.

[36] Providing Accessibility at 12 (ANSI A117.1-1986); 36 C.F.R. § 2.1 (ADA).

[37] 24 C.F.R. § 304.50.

[38] OSEP-86-14, Recommendations For Accessibility to Serve Physically Handicapped Children In Elementary Schools 2-23.

[39] 56 Fed. Reg. at 35602 (§ 36.501-508).

[40] Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, 945 F. Supp. 1 (D.C. Cir. 1996).

[41] 28 C.F.R. § 41.1 Executive Order 12250, which had empowered the Justice Department to coordinate the implementation of Section 504 along with Title VI and Title IX, has been merged into ADA.

[42] *See* Fed. Reg. at 35593 § 36.104-Definitions, July 26, 1991.

[43] 28 C.F.R. § 41.3(d).

[44] 56 Fed. Reg. at 35554. (Private schools, including elementary and secondary schools, are covered by the rules as places of accommodation).

[45] 28 C.F.R. § 41.3(d); 56 Fed. Reg. at 355595 (§§ 36.201, 36.202), July 26, 1991.

[46] *See supra*, notes 15-19.

[47] 28 C.F.R. § 45.521(a).

[48] *Id.*

[49] *Id.* at § 42.531(b). For example, in an older multi-story building, it is not necessary to install an elevator if the entire program is on the first floor. 28 C.F.R. §§ 41-56, 41.58; 45 C.F.R. § 4.23. ADA has an elevator exemption for any altered building that has less than three stories. 36 C.F.R. § 4.1.3(5)(a).

[50] 28 C.F.R. § 45.522(a).

[51] *Id.*

[52] *In re* West Warwick Pub. Sch. Dist., 4 ADD 390 (Dept. of Educ. 1993).

[53] *In re* Whitman-Hanson Regional Sch. Dist., 4 ADD 399 (Dept. of Educ. 1993).

[54] Putnam v. Oakland Unified Sch. Dist., 15 ADD 1361 (N.D. Cal. 1995).

[55] 28 C.F.R. §§ 46.601-42.613. Remedies can include damages, injunctive relief, and attorneys' fees. 29 C.F.R. § 794a; 42 U.S.C. § 2000e-5(f)-(k).

[56] 56 Fed. Reg. at §§ 36.501-505. (Remedies can include injunctive relief, other equitable relief, and damages).

[57] *See* 29 U.S.C. § 792(d).

[58] *See* Ohio Rev. Code Ann. § 378.111.

[59] Tex. Civ. Stat. Ann. Art. 601b. *See* Granny's Cottage v. Town of Occuquan, 352 S.E.2d 10 (Va. Ct. App. 1987) (whenever a part of a building is enlarged, extended or altered in Virginia, the Uniform Stateside Building Code prohibits occupancy until a certificate of use and occupancy has been issued).

[60] *See* GOLDMAN, *supra* note 3 at 480, citing to memorandum from Dan Wooldridge, President, California Board of Architectural Examiners, to licensed architects.

[61] *See generally*, WHITE, *Washington State's barrier-Free Code: Still Misunderstood After All These Years*, 20 GONZAGA L. REV. 229 (1984-85). *See also* R. BURGDORF, THE LEGAL RIGHTS OF HANDICAPPED PERSONS 465 (1980) (local enforcement may be in the hands of persons possessing limited or no experience in the fields of architectural barriers and with persons with disabilities).

[62] For an explanation of the State of Washington's experience, *See* WHITE, *supra* note 61 at 243-44.

[63] *See* Code of Virginia § 2.1-725 (prohibits private causes of action and tort actions instituted instead of or in addition to the current statutory actions for unlawful discrimination.) Cf. 56 Fed. Reg. at 35602 (§ 36.501) where ADA expressly provides for private causes of action.

[64] *See* N.Y. Pub. Bldgs. Law § 52.

[65] *See* WHITE and BURGDORF, *supra* note 61.

[66] *See* WHITE, *supra* note 61 at 242.

[67] Architectural Barriers act of 1968, 42 U.S.C. §§ 4151-4157 (1981); 36 C.F.R. § 1190.1-240 (1980); Rehabilitation Act of 1973, 29 U.S.C. §§ 791-796 (1982); 34 C.F.R §§ 104.21-104.30 (1984).

[68] *See* GOLDMAN, *supra* note 3 at 486-88; WHITE, *supra* note 61 at 233.

Teachers And the Law

15

Student Injury

Paul Thurston and Donna Metzler

Introduction

The first obligation of a school staff is to provide a safe environment for students; an obligation that precedes even its instructional responsibility.[1] Although this obligation for school safety is understood at an abstract level, the legal underpinnings for such responsibility differ from state to state. The surest way to provide protection for injured students is through an insurance program wherein students bear a modest cost for coverage that provides medical attention for those who suffer injury. As insurance premiums rise with the number of injuries, cost becomes an incentive for vigilance about the safety of the school environment. Many school districts furnish such insurance programs or make them available for parents to purchase. Avoiding liability claims provides a further incentive for teachers and principals to ensure a safe environment for students. Since the late 1950s,[2] many states have repudiated sovereign immunity, either eliminating it completely or restructuring its reach. State courts and legislatures have developed a variety of approaches in attempting to balance the need for protecting student safety in school while limiting the legal vulnerability of school employees. States differ on how they have worked out the balance of these competing interests.

To minimize both student injury and staff liability, the building principal must be knowledgeable about the legal standards that apply to situations in which students are injured and about the potential district and personal liability for such injuries. Knowledge of the legal standards does not guarantee the realization of these two objectives. As in other areas of school administration, the most effective principal is one who can take specialized knowledge, such as the specialized legal standards of liability for student injury, and present it to teachers and staff in language that they will understand and support. This presentation must avoid the technical, legal language of torts and the oversimplified, rigid rules of behavior premised on fears of personal liability. Principals who present appropriate vigilance and supervision of student safety as an educational responsibility are more likely to be successful in eliciting broad staff support in comparison to those who describe threats of liability or prescribe rigid rules of supervisory performance.

Federal constitutional and statutory law may provide an avenue for redress for certain types of student injury.[3] Fourth Amendment (search and seizure), First Amendment (free speech) and Fourteenth Amendment (equal protection and due process) provide constitutional protections that might be the basis for litigation resulting from student injuries.[4] Title IX, a federal statute that prohibits sexual discrimination in schools that receive federal support, provides a basis for district liability when students are sexually harassed by faculty members. The Supreme Court, in *Gebser v. Lago Vista ISD,*[5] formulated the standard for school district liability in such a case. A victim of sexual harassment can recover damages from the school district only if a school official with the authority to intervene actually knew of the teacher's misconduct and acting with "deliberate indifference," failed to stop it. For a plaintiff to establish liability, the school district failure must have amounted to "deliberate indifference to discrimination," which Justice O'Connor defined as an "official decision" not to act on its knowledge. This calls for deliberate, rather than simply negligent behavior by the district.

In addition to federal origins, liability for student injury can come from a number of torts.[6] Torts broadly refer to civil, noncontractual responsibilities that individuals in society owe to one another. These torts, if breached, can be the basis of monetary damages awarded by a court to compensate the injured party.[7] A number of torts can be the basis of liability for a range of student injuries: false imprisonment,[8] privacy,[9] and defamation.[10] The tort of negligence is the more common legal basis upon which individual and district liability is premised when student injuries occur in school and during school related activities.

Legal Issues

For an injured party to secure monetary damages from another party for allegedly negligent action, the injured party will need to plead and prove, at minimum, four elements.[11] Schools and their employees are not automatically responsible for every injury that may occur. For liability to be present, it must be shown that the school 1) owes a particular duty to the injured person(s), 2) that the behavior fell short of that required, 3) that this breach of the duty was the proximate cause of the injury, and 4) that there were resultant injuries. To recover damages fully, the plaintiff normally must also show no responsibility for causing the injury.

Duty of Care

The law recognizes that one person owes a duty of care to another. In the school context, it is usually not hard to show that the school and its employees have a duty to protect the health and safety of the students while they are in the custody of the school by virtue of statutes,[12] custom,[13] or common law.[14] Occasionally, a school will undertake a protective action, and injury will result at a time when the protection was not provided. Courts are then called upon to decide whether a duty of care has been assumed by the school. For example, the parents of a five year-old kindergarten student who was hit by an automobile while walking home sued the school alleging that since the school provided crossing guards in the afternoon, the school assumed a duty to provide them in the morning when half-day kindergarten students were walking home.[15] The Supreme Court of Colorado rejected this claim on the basis that it did not meet the elements of an assumed duty:

> [p]laintiff must first show that the defendant, either through its affirmative acts or through a promise to act, undertook a service that was reasonably calculated to prevent the type of harm that befell the plaintiff. Second, a plaintiff must also show either that he relied on the defendant to perform the service or that defendant's undertaking increased plaintiff's risk.[16]

Breach of Duty

A breach of the duty of due care amounts to failure of one party to conform to the standard required toward another. One has a legal duty to act as an ordinary, prudent, reasonable person for the circumstances. A child is expected to conform to the standard of care of a child of like age, education, intelligence and experience. A breach of duty can occur either from an act or an omission.[17] The breach of the duty of due care in a specific case is a question of fact. Demonstrating this breach involves both a showing of what actually happened and a showing from these facts how the defendant acted unreasonably. Failure to supervise, for example, is alleging that a teacher omitted or failed to be reasonable under the circumstances.[18]

School policy is often used as evidence of reasonable actions. There are times, however, when a person must violate policy in order to be reasonable. A 1986 case from Chicago provides a tragic example.[19] During a morning recess, several students were playing kick ball. Two sixth-grade students collided head-on while chasing a fly ball and fell to the ground, injuring one of the students. A teacher's aide walked him from the playground to the principal's office at about 10:40 a.m. The student, who had a noticeable red mark on the side of his head, sat on a bench, crying and holding his head and stomach. After about five minutes, the principal's secretary, unable to reach the mother at home, left a message for her at work. The mother called back about 11:00 a.m. and instructed the school to take the child to the hospital. The secretary telephoned the City of Chicago's 911 emergency number and stated that an injured boy needed to be taken to the hospital located directly across the street from the school. Between 10:40 a.m. and 11:30 a.m., the student's condition worsened. When the ambulance had still not arrived by 11:30 a.m., the secretary again called 911 and repeated the message about an injured boy needing help. At 11:45 a.m., the assistant principal called again and asked to speak directly to the fire department. The ambulance was dispatched immediately, reached the school in two minutes, and the child was at the hospital by noon. Because of this delay, the child's head injury severely worsened, and he suffered mental and physical impairments. The court granted a $2.5 million judgment, half assessed against the school and half against the city.

Even though the hospital was across the street from the school, and it was clear that the student's condition was quite serious, the secretary was conscientiously following board policy to work through the 911 emergency number system. This policy, presumably, had been made to limit the discretion of teachers and administrators. However, here is a clear example of a policy that needed to be violated for the people involved to act reasonably.

Causation and Damages

A reasonably close causal connection is needed between alleged misconduct and a resulting injury. This involves a cause-in-fact and sufficiently close-in-time relationship between the behavior and injury and a foreseeable consequence of the behavior. A component of breach and causation is foreseeability which suggests that the defendant could or should have seen the potentially dangerous consequences of the action when it was taken. Foreseeability does not mean that the defendant subjectively or personally foresaw the potential danger, but rather that a reasonable, prudent person would have foreseen the danger. The defendant is presumed to be a reasonable person. The jury then is given instructions similar to the following to determine foreseeability: "Would you, as a reasonable person, standing in the place of the defendant at the time of the injury, have foreseen the occurrence of injury?" Under this instruction, the jury enjoys the luxury of hindsight when determining foreseeability, something that often leads to sharper vision than the defendant actually experienced. In a Florida case,[20] where a student was badly injured in a hazing incident held at night, the appellate court gave attention to the foreseeability aspect of proximate cause:

> If the harm that occurred is within the scope of the danger or risk attributable to defendant's negligent conduct, then it is deemed foreseeable. There are three ways in which the harm may fall within the scope of danger: first, the legislature may specify the type of harm; second, if the same type of harm has occurred previously due to the same type of negligent conduct and the tortfeasor has actual knowledge of this, liability can be established; and third, liability can be made out if the negligence complained of has resulted in harm so frequently "in the field of human experience" that harm may be expected to happen again.[21]

A similar issue of foreseeability and causation arose when a second-grade student was sent home for lunch on the first day of classes at a new school, although his mother expected the student to eat at school.[22] The student was supposed to walk home at the end of the day with his sister, but she had already had lunch. The teacher decided that it was not a long walk and asked the student if he knew how to walk home. On the way home he was attacked by a dog, whereupon he ran into the street to avoid the dog and was hit by a car. The teacher was charged with responsibility for the injury. The legal question turned on whether the teacher's action was the proximate cause of the injury. One definition of the proximate cause of an injury cited in the decision was: "[I]t must appear that the injury was the natural and probable consequence of such act.... To find that an injury was the natural and probable consequence of an act, it must appear that the injury complained of could have been foreseen or reasonably anticipated from the alleged negligent act."[23] As the great majority of courts do, the Ohio Court of Appeals agreed that it is not necessary for the defendant to foresee the injury in the precise form in which it resulted. But here the court considered that the teacher's conduct was not likely to have resulted in injury to the student and that those events causing the student's injury were too remotely connected, if connected at all, with the teacher's conduct to support a finding of proximate cause.[24]

Following a torrid, unconsummated sexual relationship between a female teacher and male high school student, the student sued the district for negligent supervision. The Minnesota Supreme Court reversed the appellate court and denied the claim of liability on the grounds that there was insufficient foreseeability of this type of sexual relationship to impute liability to the district. The school district would not be held liable for unforeseeable actions when reasonable supervision of district employees are utilized.[25]

Finally, the plaintiff must show an actual loss or real damages. Nominal damages sought to indicate a technical right or the threat of future harm not yet realized are insufficient injury on which to bring a negligence action. Damages are measured in light of the particular person injured.[26]

Defenses

Even if the injured plaintiff can satisfy the *prima facie* case, the defendant still has a number of defenses available to overcome the claim. These defenses range from immunity—either common law, sovereign immunity or statutory immunity—to the more usual affirmative defenses or the introduction of a different standard of liability. This area provides wide diversity among the states, and school administrators should be aware of the particular legal standards applied in their state. In addition, school administrators should be sensitive to the divergent policy motivations underlying these defenses. Immunity, for example, limits the flow of public money to private citizens because liability payments will detract from the educational functions of the schools, whereas the affirmative defenses keep the plaintiffs from recovering for behavior for which they are responsible.

Assumption of the risk is an affirmative defense that will act as a complete bar to recovery. The concept behind assumption of the risk is that the plaintiff, either through actual knowledge or extreme recklessness, knew that the action would lead to injury. This knowledge and action in spite of it should bar recovery where the injury does in fact occur. Assumption of the risk has been abandoned in many states and severely limited in others by the rise of contributory and comparative negligence.[27]

Contributory negligence is the most significant defense in negligence. The general concept of contributory negligence is that the injured plaintiff's conduct was unreasonable, given the circumstances, and led in some way to the resulting injury. The plaintiff is totally barred from recovery, as he or she should not be able to recover for something at least partially the result of his or her actions.[28] This concept is limited somewhat in applicability in the school context because students who are injured are usually minors, and minors are presumed to have only that capacity sufficient to understand danger appropriate to their age.[29] Comparative negligence is a refinement of the concept of contributory negligence. Whereas contributory negligence is an all or nothing proposition, comparative negligence allows the amount of the negligence between the parties to be allocated comparatively on the basis of degrees of negligence. Comparative negligence is distinguished as pure or modified forms. Pure comparative negligence allows the plaintiff to recover any amount of damages for which the defendant was negligent. For example, even if the plaintiff is found by the jury to be 95 percent negligent, the plaintiff can still recover five percent of the damages in a pure comparative negligence jurisdiction. Modified comparative negligence treats any negligence by the plaintiff over 50 percent as a total bar to recovery.[30]

Immunity

A quarter of a century ago, tort liability in public schools was almost nonexistent because of sovereign immunity enjoyed by the state. The scope of such sovereign immunity is captured in a South Dakota Supreme Court quotation from a 1913 decision:

> A school district officer in the performance of his duties acts in a political capacity, as much so as the governor of a state, and is not liable for negligent acts of omission occurring in the performance of such political or public duties, unless the sovereign power of the state has authorized and consented to a suit for such negligence.[31]

Sovereign immunity has eroded to a great extent, though it still exists in several states. In many states, the courts have abolished sovereign immunity,[32] or the legislatures have abolished it[33] or passed some substitute form of statutory immunity. The application of common law and statutory immunity is an important issue in many negligence claims.[34]

A statute can limit the liability of a school district in a variety of ways. One way is to put a monetary limit on the maximum claim that a successful plaintiff can recover.[35] A second way is to provide governmental immunity generally with specific statutory exceptions enumerated. For example, Texas school districts enjoy governmental immunity except where injuries and damages arise from the use of motor vehicles.[36] A third way is to make the employee liable only for willful and wanton misconduct.[37] Finally, some states limit claims by requiring that plaintiffs provide a notice of claim within a specified period of time, usually less than a year, if they intend to bring a suit against the district. This limit allows the district a chance to protect the evidence surrounding the incident, thereby making the district less vulnerable to frivolous suits.[38]

It is possible for a state to require that the school district assume responsibility for indemnifying and providing a legal defense for employees who have been sued for professional misconduct. Illinois has a statute that requires:

> the school board...to indemnify and protect...employees against civil [and] constitutional rights claims and suits and death and bodily injury and property damage claims and suits, including defense thereof, when damages are sought for negligent or wrongful acts alleged to have been committed in the scope of employment or under the direction of the board.[39]

This statutory defense was expanded in 1998 by the requirement that liability coverage be provided by the Illinois State Board of Education at no cost to certificated school employees to at least $1,000,000 per occurrence, not to include any civil rights claim; $250,000 per civil rights claim, and $3,000,000 per occurrence aggregate for all claims.[40] These requirements provide major protection for employees by making the school district and state board of education responsible for providing lawyers and paying for any damages awarded.

Recommendations for Practice

With liability for student injury being primarily a matter of state law, it is important for the school principal to know the particular standards which apply. The principal should be knowledgeable about legal standards and terminology and should be able to talk with faculty and staff in non-technical terms. Because these liability standards are legalistic, somewhat difficult to understand, and hard to articulate, principals may be inclined to speak to teachers about safety in terms of absolute rules and behavior: "Never leave your room unattended because if a student is injured, you and the school district will be liable for the injuries." Such rules may be generally sound, but they do not completely represent an accurate description of the legal standard. There are times, for example, when failure to supervise a classroom, whether attended or not, is negligence[41] and times when it is not negligent.[42]

- It is recommended that the school develop policies that provide guidelines in certain areas, such as supervision and student safety. These policies, however, ought not be followed blindly in all school contexts and in all circumstances. Attention should be focused on maximum student safety, not on adherence to policies.

- Student injuries are going to occur, and it is the responsibility of the whole staff to be vigilant in minimizing injuries. The best way to keep injuries to a minimum is to be especially aware of the circumstances wherein injury might occur and to communicate the need to change an unsafe environment.
- Attention should be focused less on rigid rules or policies and more on actions that protect the health and safety of students. A spirit of support should be developed among the whole school staff for providing an environment that prevents students from being in injurious situations.

References

[1] Liability exists for injuries resulting from negligent supervision. Courts have not been willing to find liability where the student has not learned because of negligent instruction by school personnel. For an historical review of negligence and educational malpractice and policy arguments for why educational malpractice should be judicially recognized, *see* JURENAS, *Will Educational Malpractice Be Revived?* 74 EDUC. L. REP. 449 (1992) and BROWN and CANNON, *Education Malpractice Actions: A Remedy For What Ails Our Schools?* 78 EDUC. L. REP. 643 (1993). For an article that considers applicability of educational malpractice and special education *see* FOSSEY and ZIRKEL, *Educational Malpractice and Students with Disabilities: "Special" Cases of Liability?* 23 J. L. EDUC. 25 (Winter 1994).

[2] *See* Molitor v. Kaneland Community Unit Dist. No. 302, 163 N.E.2d 89 (Ill. 1959), *cert. denied*, 362 U.S. 968 (1960) and Carbone v. Overfield, 451 N.E.2d 1229 (Ohio 1983).

[3] 42 U.S.C. § 1983.

[4] *See, e.g.*, chapters 1, 2, and 4-5, *infra*, for a description of substantive constitutional standards that would apply.

[5] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

[6] The U.S. Constitution might be a source of remedy for certain specialized student injuries. In 1989, the U.S. Supreme Court, in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). (holding as a general rule, a state's failure to protect an individual against private violence does not constitute a violation of due process. Beyond this, the Court noted an exception to the general rule where a special relationship exists between the governmental body and the indi-

vidual, such as the incarceration of prisoners. This special relationship can cause, under the Due Process Clause, an affirmative duty to protect the individual from private violence). *See*, Schulze and Malting, ***Into the Snakepit: Section 1983 Liabiltiy Under the State-created Danger Theory For Acts of Private Violence at School,*** 104 Educ. L. Rep. 539 (1996), for an analysis of the applicability of this special relationship exception to public schools having a constitutional duty to protect students from private acts of violence while they are at school.

[7] W. P. Keeton, (Ed.), Prosser And Keeton On Torts (5th ed. 1984), p. 2; J. A. Rapp (Ed.), Education Law § 12.02 [1] (M. Bender) (1998).

[8] Prosser And Keeton On Torts, § 11, p. 47.

[9] Prosser And Keeton On Torts, § 117, p. 849.

[10] Prosser And Keeton On Torts, § 111, p. 771.

[11] The exact elements necessary for carrying the plaintiff's burden in the *prima facie* case will vary from state to state. Some states, for example, will require the plaintiff to plead an absence of contributory negligence while other states do not. *See* Prosser And Keeton On Torts, § 30, p. 164, for a more detailed description of these elements of the *prima facie* case.

[12] Prosser And Keeton On Torts, § 36, p. 220.

[13] Prosser And Keeton On Torts, § 33, p. 193.

[14] Prosser And Keeton On Torts, § 35, p. 217. *See also* Rife v. Long, 908 P.2d 143 (Idaho, 1995). (that a school district has neither a statutory nor a common law duty to the safety of its students when walking to and from school. Thus, the school was not responsible when a child was hit by a car).

[15] Jefferson County Sch. Dist. R-1 v. Gilbert, 725 P.2d 774 (Colo. 1986).

[16] *Id.* at 776. In Norton v. Canandaigua City Sch. Dist., 624 N.Y.S.2d 695 (App. Div. 1995), a New York Supreme Court refused a claim alleging school district responsibility for not providing appropriate supervision for a 10-year-old student injured while crossing the street on the way to the bus stop. The court held that state law applied only to the time the school bus is present and passengers must cross a public highway. Courts in Kansas and Idaho refused to find a statutory or common law duty for the safety of students walking to and from school. The Kansas Supreme Court in Honey v. City of Wichita, 836 P.2d 1128 (Kan. 1992) The court held that the school district had no liability for the injury of a kindergarten student hit by a train on his way home from school because

the school district has no duty to supervise or provide for the protection of pupils who are away from the school grounds and on their way home from school unless it has undertaken to provide transportation.

[17] Bielaska v. Town of Waterford, 491 A.2d 1071 (Conn. 1985). School was held liable for damages where student pushed her hand through a swinging glass door that had no crash bar, sustaining permanent injuries. Evidence showed the principal had never made any inquiries concerning prior accidents involving such doors and did not cause any warnings to be posted.

[18] Roberts v. Robertson County Bd. of Educ., 692 S.W.2d 863 (Tenn. Ct. App. 1985). County liable for teacher's negligence where a student who was assisting another student in operating a drill press was severely injured when the drill bit deflected from the machine. The teacher, who was not in the room and was not supervising the use of the machine, was found negligent for his failure to furnish adequate instruction and supervision.

[19] Barth v. Board of Educ., 490 N.E.2d 77 (Ill. App. Ct. 1986).

[20] Bryant v. School Bd. of Duval County, 399 So. 2d 417 (Fla. Dist. Ct. App. 1981).

[21] *Id*. at 421.

[22] Person v. Gum, 455 N.E.2d 713 (Ohio Ct. App. 1983).

[23] *Id*. at 716.

[24] *See* Kurshals v. Connetquot Cent. Sch. Dist., 643 N.Y.2d 622 (App. Div. 1996) (Where the New York Supreme Court, appellate division, ruled that the school district had no liability for a student falling through a skylight while retrieving a ball from the school's roof. There was no duty to warn students of the potential injury from the skylight because the danger was readily observable).

[25] P.L. v. Aubert, 545 N.W.2d 666 (Minn. 1996).

[26] *See* Swartley v. Tredyffrin Easttown Sch. Dist., 430 A.2d 1001 (Pa. Super. Ct. 1981). (Mother who had finger crushed in school door due to negligence of school received $50,000 damages because, although the finger healed for normal use, she was an accomplished flutist and the injury limited the use of the finger for playing the flute professionally).

[27] *See* Rutter v, Northeastern Beaver County Sch. Dist., 437 A.2d 1198 (Pa. 1981) (eye injury to football player participating in jungle football game should go to jury for consideration of extent of knowledge of potential injury and voluntariness of participation); and Watson v. State of New York, 431 N.Y.S.2d 55

(App. Div. 1980). (attack by student who was subsequently injured amounted to assumption of risk).

[28] *See, e.g.*, La Fleur v. State Farm Mutual Auto. Ins. Co., 385 So. 2d 564 (La. Ct. App. 1980) (contributory negligence found when pupil disembarked school bus in an unusual fashion and got left wrist caught in the door), and Berman v. Philadelphia Bd. of Educ., 456 A.2d 545 (Pa. 1983) (rebuttable presumption that minors between the ages of seven and fourteen are incapable of contributory negligence not overcome by any showing of superior intelligence or experience).

[29] *See* Gary v. Meche, 626 So. 2d 901 (La. Ct. App. 1993).

[30] *See* Alvis v. Ribar, 421 N.E.2d 886 (Ill. 1981) (this case provides a scholarly review of the concept of comparative negligence documenting its status in the 36 states which recognize it and distinguishes between pure and modified forms).

[31] Merrill v. Birhanzel, 310 N.W.2d 522 (S.D. 1981).

[32] *See* Claymont Sch. Dist. v. Beck, 424 A.2d 662 (Del. 1980).

[33] *See, e.g.*, S. C. JACOBSON, Comment, *The Kansas Tort Claims Act and School Districts,* 28 U. KAN. L. REV. 619 (1980).

[34] *See, e.g., the following decisions where sovereign immunity was routinely applied to bar negligence actions against school districts: Holloway v. Dougherty County Sch. System, 277 S.E.2d 251 (Ga. Ct. App. 1981) (student was injured when a milk crate she was standing on to get a drink turned over); and Hennessy v. Webb, 264 S.E.2d 878 (Ga. 1980) (student was injured from falling over the mat placed at the door of the school).*

[35] *See* Espinosa v. Southern Pacific Transp. Co., 624 P.2d 162 (Or. Ct. App. 1981) (damages were limited to $100,000 by statute upheld although a $302,000 jury award was returned and the district was covered by one million dollars of insurance).

[36] *See* Estate of Garza v. McAllen Ind. Sch. Dist., 613 S.W.2d 526 (Tex. Ct. App. 1981) (stabbing death of a student on a school bus held not to fall within the motor vehicle exception to governmental immunity).

[37] *See* Knapp v. Hill, 657 N.E.2d 1068 (Ill. App. Ct. 1995) (conduct of high school automobile repair course for allegedly failing to supervise students who were moving their automobiles back to school parking lot after class during which action one student was killed, was insufficient to establish willful and wanton conduct).

[38] *See* Coonradt v. Averill Park Cent. Sch. Dist., 427 N.Y.S.2d 531 (App. Div. 1980) (notice of late claim filed beyond 90 day statutory period allowed where district had actual knowledge of intended filing of suit and mother had sole responsibility as sup-

porter of six children), and Meli v. Dade County Sch. Bd., 490 So. 2d 120 (Fla. Dist. Ct. App. 1986) (notice waived where responsible officials have actual knowledge of the injury and pursue a course of action which would lead claimant to believe that actual notice is unnecessary).

[39] 105 I.L.C.S. 5/ 10-20.20 (1998).

[40] 105 ILCS 5 / 2-3.124 (1998).

[41] Alferoff v. Casagrande, 504 N.Y.S.2d 719 (App. Div. 1986) (jury verdict of negligence upheld where a student was injured by an eraser thrown while the teacher was out of the room and the teacher was aware of rowdy behavior of students in his absence).

[42] James v. Charlotte-Mecklenburg Bd. of Educ., 300 S.E.2d 21 (N.C. Ct. App. 1983) (eye injury to sixth grader while teacher was absent from classroom was not foreseeable and teacher had no duty to remain with her class at all times).

16

Sexual Harassment in the Workplace

M. David Alexander, Jennifer A. Sughrue and Mary F. Hughes

Introduction

Sexual harassment in the workplace was raised to national prominence during the Senate confirmation hearings for United States Supreme Court nominee Clarence Thomas when Anita Hill, a law professor from the University of Oklahoma and a former employee under Thomas, testified of alleged acts of sexual harassment by Thomas.[1] Before the Thomas nomination, the law limited the damages that victims could collect in sexual harassment cases basically to equitable relief that included back pay and attorney fees. The law did not allow for punitive damages or for other substantial monetary relief. On November 21, 1991, one month after the confirmation hearing, the United States Congress passed Public Law 102-166, the 1991 Civil Rights Act, which included the rights of sexual discrimination victims to sue for damages ranging from $50,000 for companies with 100 or fewer workers to $300,000 for employers with more than 500 workers.

Legal Issues

Despite the clarity of the legal language, sexual harassment is not easily defined and its incidence difficult to measure. It may range from verbal innuendo to an overt act, and the definition must be broad enough to encompass the diversity of behavior.[2] Starting in the 1970s,[3] litigation and the feminist movement prompted various studies, including Catherine MacKinnon's book, *Sexual Harassment of Working Women*. As a result, sexual harassment became recognized as a serious problem within the workplace.[4]

Sexual harassment is uniformly cast as a gender issue since the overwhelming majority of cases involve female workers being harassed by male colleagues and supervisors.[5] Recent litigation, however, brought attention to the issue of same sex harassment.[6] The Supreme Court ruled that both males and females enjoy protection from sexual discrimination under Title VII, and that includes protection from same sex harassment.

> As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion]...because of...sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statute.[7]

There are recent legal developments in the arena of sexual harassment of students. School district liability for peer-to-peer (student-to-student) harassment was addressed by the Supreme Court[8] in 1999. Also, elementary and secondary school student victims who are sexually harassed by or who have sexual contact with teachers can now collect monetary damages from school districts and teacher defendants.[9] Previously, such cases were handled legally through child abuse statutes[10] and teacher dismissal statutes. The focus of this chapter is on employee-to-employee sexual harassment.

Title VII

Employees are protected from sexual harassment in the workplace by Title VII of the Civil Rights Act of 1964 and under the new Civil Rights Act of 1991, which amends the Civil Rights Act of 1964, strengthens the Federal Civil Rights Laws, and provides for damages in cases of intentional employment discrimination. Title VII makes it "an unlawful employment practice for an employer...to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[11] Court cases concerning sex discrimination in the 1970s started recognizing sexual harassment, but it was not until 1980 that the Equal Employment Opportunity Commission (EEOC) promulgated regulations prohibiting sexual harassment. These regulations provide that:

> Unwelcome sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature constitute harassment when 1) submission to such conduct is made explicitly or implicitly a term or condition of an individual's employment, 2) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, 3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[12]

According to earlier EEOC guidelines, there were two types of sexual harassment, *quid pro quo* and *hostile work environment*. The first type, *quid pro quo*, referred to those situations in which employment opportunity or benefit was dependent upon compliance with or acceptance of sexual advances. The second type of sexual harassment, *hostile work environment*, referred to abusive conditions in the workplace; that is, an employee was made to feel uncomfortable by the sexual nature of comments, stares, jokes, innuendo, and other similar occurrences in the workplace. The United States Supreme Court, in *Meritor Savings Bank, FSB v. Vinson*,[13] a leading case on sexual harassment, stated:

> [T]he guidelines provide that sexual conduct constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[14]

In *Meritor Savings Bank, FSB v. Vinson*, Michelle Vinson, an employee of the bank, was supervised by Sidney Taylor. Vinson was promoted from teller-trainee to assistant branch manager in four years; the advancements were based on merit. Shortly after Vinson was employed, Taylor made sexual advances toward her. Out of fear of losing her job, Vinson consented to having sexual intercourse with Taylor. They engaged in sexual intercourse approximately 40 to 50 times over the next four years. In September, Vinson told Taylor she was taking indefinite sick leave; subsequently, in November, she was discharged for excessive use of leave.

In the *Vinson* ruling, the Supreme Court upheld the EEOC guidelines and emphasized the concept of the hostile environment in the workplace. Taylor claimed that Vinson's participation had been voluntary, but the Court ruled that the concept of voluntary participation could not be used as a defense if the sexual advances were unwelcome. The Court said that in determining whether sexual advances were unwelcome, the "correct inquiry was whether the bank employee, by her conduct, indicated that sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."[15]

In a 1998 case, *Burlington Industries, Inc. v. Ellerth,*[16] the United States Supreme Court determined a single test of employer liability for harassment by supervisors under Title VII. The Court ruled that even where the employee suffered no tangible retaliation in employment opportunity or benefit, an employer has vicarious liability for a hostile environment created by the severe or pervasive conduct of a supervisor.

Kimberly Ellerth was a salesperson for Burlington Industries, but she quit her job after 15 months allegedly because she had been sexually harassed by one of her supervisors, Ted Slowik. Ellerth suffered no adverse employment consequences as a result of rejecting Slowik's sexual advances; however, Ellerth claimed the hostile work environment forced her constructive discharge. The Supreme Court ruled that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."[17]

In a companion case to *Ellerth*, ocean lifeguard Beth Ann Faragher resigned her position with the City of Boca Raton and brought suit, claiming that her supervisors, Bill Terry and David Silverman, "had created a 'sexually hostile atmosphere' at work by repeatedly subjecting Faragher and other female lifeguards to 'uninvited and offensive touching,' by making lewd remarks, and by speaking of women in offensive terms."[18] The lower court ruled that the City did not have vicarious liability because it did not have actual or constructive knowledge of the supervisors' inappropriate behavior. The Supreme Court disagreed and assigned vicarious liability to the City, noting that sexual harassment is "one of the normal risks of doing business" and that an employer "can reasonably anticipate the possibility of sexual harassment occurring in the workplace."[19]

In both cases described above, the Supreme Court also ruled that the employer may offer an affirmative defense to vicarious liability. This opportunity to defend against liability was open to the employer only because the employee had not suffered job retaliation. The Court was very clear on this point: "no affirmative defense is available...when the supervisor's harassment culminates in a tangible employment action."[20]

An affirmative defense must demonstrate "by a preponderance of evidence" that "(a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[21] Burlington Industries had a policy against sexual harassment with guidelines for submitting a complaint. Ellerth, however, did not avail herself of these procedures and, in fact, admitted she did not inform her immediate supervisor because he would be obligated to report the incidents. Noting these circumstances in its remand to the lower court, the Supreme Court held that Burlington was subject to vicarious liability for Slowik's actions, but that it should have the opportunity to offer an affirmative defense to its liability.

The City of Boca Raton also had a sexual harassment policy, yet information provided the Court indicated that the City did not distribute its policy among the beach employees, did not provide adequate oversight of its supervisors' conduct, and did not provide any assurances in its policy that harassing supervisors could be bypassed in registering complaints. The Court held that the City "could not be found to have exercised reasonable care to prevent the supervisors' harassing behavior,"[22] hence, questioned the City's ability to offer an affirmative defense. It is important to emphasize that the City of Boca Raton lost the opportunity to establish an affirmative defense partially because "it officially made no attempt to keep track of the conduct of [its] supervisors."[23]

As illustrated in *Ellerth* and *Faragher*, the early distinction between *quid pro quo* and *hostile environment* harassment has been modified by the Supreme Court and by updated EEOC guidelines. The modification reflects the Supreme Court's creation of a single test (the existence of severe and pervasive conduct) for an employer's vicarious liability, and it determines whether an employer will have an opportunity to raise a defense (when there is no evidence of adverse effect on employment) to an ascribed vicarious liability. It is now more accurate to distinguish between "harassment *that results in a tangible employment action* [emphasis added] and harassment that creates a hostile work environment, since that dichotomy determines whether the employer can raise the affirmative defense to vicarious liability."[24]

In a recent school case brought under Title VII, an elementary school teacher, Kelly Scrivner, alleged that she was sexually harassed by her principal, Alfonso Cardenas, and suffered job retaliation. She sued Socorro Independent School District (SISD) for vicarious liability. The school district conceded that a hostile work environment was created by Cardenas's behavior. However, SISD was allowed to offer an affirmative defense because Scrivner could not substantiate her claim she suffered a tangible adverse effect in her employment. The facts of the case indicate that SISD received an anonymous letter in 1994 complaining about Cardenas's harassing behavior. In response the district launched an investigation during which Scrivner was interviewed, along with 63 other faculty and staff. Although she later detailed incidents in which Cardenas harassed her, she denied in the interview that his behavior was harassing or vulgar. Based on its investigation, SISD found no tangible evidence of sexual harassment, but it warned Cardenas to "refrain from making unprofessional [j]okes, innuendoes, and pointed comments'."[25] Frustrated that Cardenas's behavior worsened after the investigation, Scrivner filed a formal complaint in 1996 with the district against Cardenas, claiming that he had called her a lesbian among other sexual harassing behaviors. The district again promptly initiated and published the results of an investigation and concluded that the principal's behavior created a hostile environment. Cardenas was removed from his position, and he soon resigned from the district. In its affirmative defense to vicarious liability, the district was able to demonstrate that it had promulgated an anti-discrimination policy, that it had responded reasonably and vigorously to the two harassment complaints filed against Cardenas, and that Scrivner had "unreasonably failed to take advantage of any preventive or corrective opportunities provided by [SISD] or to avoid harm otherwise."[26]As a result, the Fifth Circuit upheld the lower court's summary judgement for the district defendant.

Title IX

Title IX of the Education Amendments of 1972 addresses sex discrimination and sexual harassment. The sexual harassment prohibition of Title IX is not as clear as in Title VII. Title IX specifies: "No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."[27] Since Title IX was patterned after Title VI of the Civil Rights Act of 1964 and covers students in educational institutions, some courts ruled that Title IX does not cover school employees. In 1982, however, the Supreme Court stated that "while Section 901(a) does not expressly include employees within its scope or expressly exclude them, its broad directive that 'no person' may be discriminated against on the basis of gender...includes employees as well as students."[28]

The Office of Civil Rights (OCR) of the United States Department of Education is the primary administrative agency charged with enforcing Title IX. Unlike EEOC, which enforces Title VII, OCR has failed to promulgate regulations or official guidelines regarding sexual harassment. Despite the absence of guidelines, OCR maintains that sexual harassment is prohibited by Title IX.[29] The debate over whether Title IX covers sexual harassment was settled by the Supreme Court on February 26, 1992, in *Franklin v. Gwinnett County Public Schools.*[30] The Court ruled that a damage remedy is available for a sexual harassment action brought to enforce Title IX. Enforceability was available through an implied right of action. In *Franklin v. Gwinnett*, a female student had been subjected to continual sexual harassment from a high school coach/teacher. School officials, after becoming aware of the harassment, discouraged the student from pressing charges against the teacher. Subsequently, the teacher resigned on the condition all matters relating to him be dropped. The school agreed and closed the investigation. The district court dismissed the student's complaint, ruling that Title IX did not provide for damages. In determining that Title IX did allow damages, the Supreme Court opined:

> The assertion that Title IX remedies should nevertheless be limited to back pay and prospective relief diverges from this court's traditional approach to deciding what remedies are available for violations of a federal right. Both suggested remedies are equitable in nature, and it is axiomatic that a court should determine the adequacy of damages of law before resorting to equitable relief. Moreover, both suggested remedies are clearly inadequate in that they would provide Franklin no relief: back pay because she was a student when the alleged discrimination occurred, and prospective relief because she no longer attends school in respondent system and Hill no longer teaches there.[31]

A case decided before *Franklin* appeared to indicate this liability. In *Lipsett v. University of Puerto Rico,*[32] the court stated that in a Title IX case, an educational institution is absolutely liable for *quid pro quo* sexual harassment and discriminatory discharge regardless of whether it knew, or should have known, or approved of the actions of the supervisor involved. The educational institution also is liable for hostile environment sexual harassment unless the education institution can demonstrate that appropriate steps were taken to dissipate the hostile environment. Among specific behaviors (that are unwanted and sexual in nature) that could constitute hostile environment sexual harassment are: touching, verbal comments, sexual name calling, spreading sexual rumors, gestures, jokes/cartoons/pictures, too personal a conversation, cornering/blocking movements, pulling at clothes, and attempted rape and rape.[33] School districts that do not have a sexual harassment policy and grievance procedure are in violation of Title IX.[34] While the Supreme Court has decided that Title IX protection extends to employees as well as students, litigation for sexual harassment under Title IX has remained primarily the domain for student complaints. There are no Title IX cases brought by school employees on which federal courts have ruled.

Equal Protection

The Seventh Circuit Court of Appeals, in *Bohen v. City of East Chicago*,[35] was the first federal court to recognize a sexual harassment claim under the equal protection clause of the Fourteenth Amendment. This action opens another legal avenue for public employees.[36] To be successful, the plaintiff must show that the discrimination was intentional. The plaintiff's claim must demonstrate that the sexual harassment was "intent[ed] to discriminate because of her status as a female and not because of characteristics of her gender which are personal to her."[37] This discrimination may be shown by a single event, but it is unlikely that one event will constitute denial of equal protection. In *Bohen*, the court said, "Forcing women and not men to work in a an environment of sexual harassment is no different than forcing women to work in a dirtier or more hazardous environment than men simply because they were women."[38]

Recommendations for Practice

Standards for sexual harassment in the workplace are the same for both public and private employers. As evinced in *Ellerth* and *Faragher*, the employer may have vicarious liability for severe or pervasive conduct of employees in supervisory positions, but may offer an affirmative defense if the plaintiff employee has suffered no tangible adverse effect on his or her employment. An important component of the affirmative defense is demonstrating the existence of an anti-sexual harassment policy. With this in mind, the following recommendations are made. The local school board should: develop, review, and disseminate a strong workplace policy prohibiting sexual harassment. Preferably there should be a mechanism for the faculty and staff to contribute to and ultimately endorse the policy and to help monitor it.

- The policy should contain a statement explaining why it is important to prevent sexual harassment.
- Included in this policy should be a clear description or explanation of the prohibited behaviors. Generally speaking, these behaviors are unwarranted or unwanted sexual attention from peers, subordinates, supervisors, customers, clients, or anyone the employee must interact with in order to fulfill the duties of the job or school where the employee's responses might be restrained by fear of reprisals. The range of behaviors includes but is not limited to leering, pinching, unnecessary touching or patting, verbal comments, subtle pressure for sexual activity, rape, and attempted rape.
- There should be clear assurances in the policy that an employee who files a harassment complaint or who provides information related to such a complaint will be protected from retaliation. There should also be assurances that to the degree possible, the employer will protect the confidentiality of those who file harassment complaints.
- The policy should outline procedures for filing a complaint and should describe the employer's process for investigating and responding to a complaint. The process should include: (a) the timeline for the investigation; (b) suggestions for possible informal resolution of the problem; and (c) assignment of complaint managers who are respected by the employees, are sensitive to the issue, and able to empathize with the victim.[39]
- Adopt, publicize, and enforce penalties for violations of the policy.[40]
- Keep written records; however, the board should take precautions to protect confidentiality.[41]
- Publish results of resolved complaints, but should protect the identity of the individuals involved.[42]
- Facilitate employees' awareness of the EEOC sexual harassment guidelines and alertness to the problem: 1) It is advisable that employers conduct periodic training for administrators and others in supervisory positions, teachers, and staff to ensure all employees understand and comply with the policy; 2) Orientation programs for new faculty and staff should include discussion of the sexual harassment policy and EEOC guidelines.
- Include all policies related to sexual harassment in faculty, staff, and student handbooks.

References

[1] Testimony of Anita Hill and Clarence Thomas on nationally televised Senate confirmation hearings for United States Supreme Court nominee, Clarence Thomas, October 10-13, 1991.

[2] SCHNEIDER, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525 (Feb. 1987).

[3] INGULLI, *Sexual Harassment in Education*, 18 RUTGERS L. J. 281, 282 (Winter 1987).

[4] *See* MONDSCHEIN and GREENE, *Sexual Harassment in Employment and Educational Practices*, SCH. L. UPDATE 1986 (ERIC Document No. ED 272996).

[5] GIBBS, *Sex, Lies, and Politics: America's Watershed Debate on Sexual Harassment,*. TIME 138, no. 15 (October 21, 1991).

[6] *In* Oncale v. Sundowner Offshore Services, Inc., Joseph Oncale, a male worker on an offshore rig, alleged that he had been "forcibly subjected to sex-related, humiliating actions…physically assaulted…in a sexual manner, and…threatened with rape" 118 S. Ct. 998, 1001 (1998). It is interesting to note that this is the only majority opinion that ruled in favor of the victim of sexual harassment in which Justice Thomas concurred. In the other key post-1991 Title VII cases discussed above, Justice Thomas submitted a dissenting opinion.

[7] *Id.*, 1002.

[8] Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661 (1999).

[9] Gebser v. Lago Independent School Dist., 118 S. Ct. 1989 (1998).

[10] *See* C. HOOKER, *Teacher Dismissal for Improper Touching or Sexual Contact with Students*, 39 EDUC. L. REP. 941 (1987).

[11] 42 U.S.C. § 2000e-2(a)(1).

[12] 29 C.F.R. § 1604.11(a) (1986).

[13] Meritor Savings Bank, FSB v. Vinson, 106 S. Ct. 2399 (1986).

[14] *Id.* at 2404-2405.

[15] *Id.* at 2406.

[16] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998).

[17] *Id.* at 2261.

[18] Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2277 (1998).

[19] *Id.* at 2278.

[20] *B*urlinton Industries, Inc, v. Ellerth, at 2270.

[21] *Faragher,* at 2279.

[22] *Id.*

[23] *Id.* at 2293.

[24] EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, no. 915.002, endnote 7 (June 18, 1999).

[25] Scrivner v. Socorro Independent School District, 169 F3d 969, 970 (5th Cir. 1999).

[26] *Id*. at 971.

[27] 20 U.S.C. § 1681.

[28] North Haven Bd. of Educ. v. Bell, 102 S. Ct. 1912, 1914 (1982).

[29] SCHNEIDER, *supra* note 2 at 525.

[30] Franklin v. Gwinnett County Public Schools, 112 S. Ct. 1028 (1992).

[31] *Id*. at 1030-1031.

[32] Lipsett v. University of Puerto Rico, 864 F2d 881, 882 (1st Cir 1988).

[33] STRAUSS, *Sexual Harassment in the School: Legal Implications for Principals, NASSP* BULL: 93-97, 94 (March, 1988).

[34] *Id*. at 93-97.

[35] Bohen v. City of East Chicago, 799 F.2d 1180 (7th Cir 1986).

[36] In *Bohen*, the plaintiff was a fire department dispatcher. Her co-workers and supervisor subjected her to repeated acts of sexual harassment.

[37] Trautvetter v. Quick, 916 F2d 1140, 1151 (7th Cir 1990).

[38] *Bohen*, at 1185.

[39] STRAUSS, *Supra* note 33 at 97.

[40] Nebraska Association of School Boards, *12 Steps to Deal with Sexual Harassment in Schools,* NASB EMPLOYEE QUARTERLY, (Summer 1993), on-line: http://www.nebr-schoolboards.org/12steps.htm.

[41] *Id*.

[42] *Id*.

17

Academic Freedom and Censorship

Floyd G. Delon

Introduction

The concept of academic freedom originated at the university level and is more often associated with the professor's role rather than that of the primary or secondary teacher. While, initially, the term was used to describe the professor's right to decide what should be taught; through the years the term has taken on broader meanings. Today, even at the university level, different views exist as to its nature and its legal status. Although some legal scholars and many academicians adhere to the position that academic freedom is an "inalienable" right of the professor or teacher to select both content and method of instruction, others deny that academic freedom has any sort of independent existence beyond the First Amendment rights possessed by all citizens.

Censorship refers to the suppression of speech or other forms of expression and to any disciplinary action taken by government or governmental agencies such as public schools. The extensive case law on censorship is applicable to all public employees including teachers. Although the Supreme Court has rendered a series of landmark decisions on this issue involving both students and teachers over the past four decades, disputes continue to arise asserting First Amendment protection against censorship. When the terms, "censorship" and "academic freedom" are linked, the primary focus is teacher's speech related to the curriculum.

Legal Issues

The United States Supreme Court first recognized academic freedom in the 1950s and 1960s in cases resulting from attempts to rid the schools of Communist influences.[1] It was not until 1968, in *Pickering v. Board of Education*,[2] that the Court ruled that teacher speech in the form of a letter to a newspaper was entitled to First

Amendment protection. The Court held that a teacher cannot be discharged or otherwise punished for speaking out on issues of "public" concern. The following year, in *Tinker v. Des Moines*,[3] the Court proclaimed that neither students nor teachers "shed their constitutional rights to freedom of expression at the schoolhouse gate" and declared that interference with those rights could be justified only on the basis of "substantial and material" disruption.

In *Mt. Healthy City School District v. Doyle*,[4] the Court expressly recognized that other legitimate reasons can exist for disciplining teachers who at the same time are exercising their constitutional rights. This 1977 decision established the required approach for deciding such cases. First, the teacher has the burden of showing that constitutionally-protected conduct was a motivating factor in the teacher's discharge or other disciplinary action against him or her. Assuming that the teacher successfully makes that showing, the burden shifts to the school officials to prove that they would have followed the same course of action in the absence of the protected conduct. On the heels of that decision, the Court made it clear that speech of public concern is protected speech even though it may be expressed privately by an employee to a supervisor.[5] In 1983, the Court reinforced its *Pickering* standard by upholding the employer's right to dismiss an employee whose speech was of a private rather than a public concern.[6]

It has been more than a decade since the Supreme Court rendered its most recent decisions on free speech in schools. In its 1986 decision, *Bethel School District No. 403 v. Fraser*,[7] the Court found no First Amendment protection for obscene or vulgar speech. Two years later, the Court upheld the authority of school officials to control the curriculum in *Hazelwood School District v. Kuhlmeirer*[8] when it permitted administrators to delete objectionable articles from the school newspaper. Even though these cases pertained to students' speech, they have profoundly affected the subsequent rulings of the lower courts in their rulings on teachers' speech, especially those cases in which the teacher claimed to be protected by academic freedom.

Following the precedents represented by the Supreme Court decisions, the lower courts in subsequent cases became more supportive of school officials in disputes with teachers stemming from the choice of instructional materials and methods. In fact, two state supreme courts had adopted the rationale established in *Hazelwood* two years before the High Court ruled. In 1985, the Alaska Supreme Court upheld the dismissal of a teacher who violated a school policy requiring administrative approval of supplementary materials used in classes.[9] The materials in question included a book on gay rights. The court stated that the First Amendment does not "eliminate the school board's right to control the curriculum."[10] Similarly, the Maine Supreme Court rejected the claims of a teacher who charged that the school board had violated his right to academic freedom under the First Amendment by canceling a symposium he had planned.[11] This program, referred to as "tolerance day" was arranged by the teacher in response to the drowning of a homosexual person by three high school students. The court stated: "However broad the protections of academic freedom may be, they do not permit a teacher to insist upon a given curriculum for the whole school where he teaches."[12]

Beginning in the late 1980s, a series of federal circuit courts decided a number of First Amendment speech cases involving schools. The Sixth Circuit refused to overturn the dismissal of a teacher who had shown an "R" rated video tape to high school students.[13] The court's majority, applying the *Mt. Healthy* approach, found that since the tape was not "expressive or communicative" it did not qualify as speech protected by the First Amendment. In a concurring opinion, agreeing with the outcome, another judge relied on *Bethel*, pointing out the vulgar content of the tape which was shown to a captive audience justified the teacher's dismissal.

The Third Circuit reviewed a decision in a very complicated case in which a teacher sought an injunction to prevent school officials from banning a teaching methodology she favored and barring them from interfering with her use and advocacy of the method.[14] Although the appellate court agreed with the district court's denial of the injunction, it observed that if the teacher were disciplined for the advocacy of the methodology outside the school, her First Amendment rights would be violated.

In 1991, the Tenth Circuit considered an appeal of a teacher who was punished with a four-day suspension and a letter of reprimand for remarks made in class during an informal discussion.[15] The offensive remark repeated a rumor about two students "making out" on the tennis courts. The teacher filed suit charging that the disciplinary action "chilled" his free speech rights and violated his academic freedom. Beginning with the first step of the *Mt. Healthy* analysis, the court decided that the teacher's comments were constitutionally protected, shifting the burden to the school officials. Relying on *Hazelwood*, the court reasoned that the teacher's comments were "school sponsored expression" in a nonpublic forum;[16] therefore, school officials need only show "a legitimate pedagogical interest" in controlling the teacher's speech. That burden was met because the school is justified in insisting that a teacher "exhibit professionalism and sound judgment" and not "make statements about students that embarrass those students among their peers."[17] Lastly, in rejecting the other claim, the court said: "[T]he caselaw does not support [his] position that a secondary school teacher has a constitutional right to academic freedom."[18]

By the end of the decade, the Fourth and Eighth Circuits had ruled in cases that clearly involved disputed authority to control curriculum. In *Boring v. Buncombe County Board of Education,*[19] the court affirmed the transfer of a drama teacher who selected a play that administrators later decided was inappropriate for her students. A divided Fourth Circuit in considering the issue of "[w]hether a public high school teacher had a right to participate in the make up of the school curriculum through the selection and production of a play," ruled that she did not. Finding that the board had "legitimate pedagogical reasons" for its actions, the appellate court sustained the district court's judgment for the school district. In *Lacks v. Fersuson Reorganized School District R-2,*[20] the Eighth Circuit permitted the board to dismiss a tenured high school teacher after she allowed students to use vulgar language in plays they wrote and performed as an assignment in her creative writing class. This decision turned on the court's finding that the board had established a legitimate pedagogical concern in prohibiting profanity in the classroom, that the principal had warned her of violations of a board policy on profanity, and she had been dismissed for violating board policy as provided by state law. The Supreme Court declined to review either of these decisions.

Recommendations for Practice

Principals of the twenty-first century have the guidance of a line of cases in which the courts, with remarkable consistency for more than a decade, have supported the authority of the public schools to control curriculum. Nonetheless, school administrators must realize that censorship of teachers' speech still carries with it the risk of a law suit [21] with the possibility of the assessment of damages should the teacher win. Principals should know and respect the teacher's rights. They should approach personnel problems with a spirit of fairness and attempt to resolve them by doing what is in the best interest of the students. Finally, they should recognize potential legal implications and act under the guidance of competent legal counsel, before, and not wait until after such problems develop. The lessons of the cases reviewed serve as the basis for additional suggestions that follow:

- Be aware that outside of the classroom a teacher has a First Amendment right to express opinions about matters of public concern even though those views may be controversial and unpopular. The only justification for interfering or punishing the teacher for such speech is material and substantial disruption of the educational process.

- Exercise extreme caution when recommending the release of inferior or otherwise undesirable teachers who at the same time may be engaged in protected speech or other constitutional rights. The evidence documenting the legitimate reasons for the action must convince the courts that those reasons alone would have resulted in the dismissal or other disciplinary action.
- Do not base a recommendation for dismissal or other disciplinary action on what the teacher may have said in a private conference because if the statements are about matters of public concern, they are protected speech.
- If the teacher is to be disciplined for what he or she says in the classroom or for the subject matter or methods he or she may use, make sure that the school has and can show some legitimate pedagogical justification for this action.

The twenty-first century began with public school administrators having broad judicial support for their authority to control the curriculum. In the near future, there is little indication that this authority will be eroded by elementary and secondary school teachers' claims of academic freedom. However, few would question the desirability of teacher involvement in curriculum decisions. Communication between principal and teacher about what is taught and how it is taught is essential.

References

[1] *See, e.g.*, Keysishian v. Board of Regents of Univ. of N.Y., 385 U.S. 589 (1967).
[2] Pickering v. Board of Education, 391 U.S. 563 (1968).
[3] Tinker v. Des Moines, 393 U.S. 503 (1969).
[4] Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977).
[5] Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979).
[6] Connick v. Myers, 461 U.S. 138 (1983).
[7] Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986).
[8] Hazelwood School District v. Kuhlmeirer, 484 U.S. 260 (1988).
[9] Fisher v. Fairbanks North Star Borough Sch. Dist., 704 P.2d 213 (Alaska 1986).
[10] *Id.* at 217.
[11] Solmitz v. Maine School Admin. Dist. No. 59, 495 A.2d 812 (Me. 1986).

[12] *Id.* at 817.

[13] Fowler v. Board of Educ. of Lincoln County Sch. Dist., 819 F.2d 657 (6th Cir. 1987).

[14] Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172 (3d Cir. 1990).

[15] Miles v. Denver Pub. Sch., 944 F.2d 773 (10th Cir. 1991).

[16] *Id.* at 776.

[17] *Id.* at 778.

[18] *Id.* at 779.

[19] Boring v. Buncombe County Bd. of Educ., 136 F.3d 364 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 47 (1998).

[20] Lacks v. Fersuson Reorganized Sch. Dist. R-2, 147 F.3d 718 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1158 (1999).

[21] *See, e.g.*, Harris v. Victoria Indep. Sch. Dist., 168 F.3d 216 (5th Cir. 1999) (which was initiated by teachers who were transferred to other schools in the district after they criticized the school principal).

18

Evaluations

Lynn Rossi Scott[1]

Introduction

A principal is often charged, whether under state statute, regulation, or some negotiated agreement, with the responsibility to evaluate those individuals whom he or she supervises. Unfortunately, and somewhat ironically, the evaluation of campus employees is perhaps the most difficult job function of the campus principal. Since most campus principals are former classroom educators, one of the basic philosophical beliefs of an educator is that "All Children Can Learn." A dedicated educator believes that if a child has not learned something, it is a reflection of the teacher's ability to teach, as much as the student's ability to learn. Therefore, the educator may have to reteach, repeat, or try different manipulations of the environment, different instructional strategies, or different presentation methods in order for a child to learn. The evaluation of employees requires, at least to some degree, the same mindset, since evaluation first works to improve instruction. Still, it is not the responsibility of the supervisor, evaluator or administrator to manipulate the environment, to change the employee's job description, or to reteach the employee so that the employee will learn how to do his or her job. At some point, after the supervisor has given the employee full notice of job expectations and performance deficiencies, it is the employee's responsibility to perform at an acceptable level; it is not the supervisor's responsibility to change the job so that the employee is successful. This chapter will discuss judicial guidance regarding the elements of appropriate evaluation systems and practical advice to avoid legal claims.

Legal Issues

Goals and Functions of Evaluation

The goal of evaluation is to improve employee performance. An effective evaluation system provides a pattern of continual feedback regarding an employee's job performance, so that, at the time of a summative evaluation, there are few, if any, surprises regarding the supervisor's opinion of the employee's job performance. In order to accomplish this, it is necessary that there be in place sound policies and procedures for evaluation; and that the supervisor gives advance notice of performance criteria, the supervisor's priorities and preferences, the supervisor's expectations, and the procedures which will be followed. Then, specific job-related performance criteria must be applied consistently to all employees. After the employee receives notice of job performance deficiencies, it is then up to the employee to remediate the employee's performance, sometimes with the assistance of the employee's supervisors or other support administrators. When, and only when, efforts to correct deficiencies and improve job performance fail, then the evaluation process can become a system for documenting inadequate job performance which justifies an adverse employment decision. However, an adverse employment decision is not the goal of evaluation. An adverse employment decision should be viewed as the unfortunate result when an effort to improve employee performance fails and the employee either refuses or is incapable of performing at an acceptable level.

An appropriately conducted evaluation process opens the way for open, honest and effective communication between the supervisor and the employee, making clear the supervisor's expectations for job performance and the supervisor's methods of evaluating that job performance. The evaluation process then provides the employee with notice of strengths and weaknesses and notice of required improvements in job performance. This notice then becomes an effective tool to manage employee behavior. In the vast majority of cases, the outcome of an appropriate evaluation system is improved employee performance.

Legal Intervention

In rare situations, the ultimate outcome is the termination of an employee's employment or the recognition by the employee that it is time to move on to another job. Adverse employment decisions are often litigated. At the time that a state or federal judge steps in to review an employer's actions regarding an employee's job performance, the judge is not in a position to view a teacher in a classroom or a custodian in a hallway. Rather, the judge must rely on complete written evaluation documents drafted by the supervisor and others with responsibility to inform employees of necessary remediation of their job performance. Evaluations, therefore, become critical evidence justifying adverse employment decisions. Judicial intervention in employee evaluation or termination often requires that the court interpret statutory language, regulatory provisions, board policies, collective bargaining agreements, contract language, and the evaluation instruments themselves. Therefore, it is essential that these potential pieces of evidence be understandable to non-educators, be direct, clear, and capable of withstanding such judicial scrutiny.

The Importance of Appropriate Evaluation Systems

A proper evaluation can make a termination case pass judicial muster. On the contrary, a poorly drafted evaluation, or the lack of an evaluation, can doom a termination case. The Supreme Court of Nebraska recently reviewed such a superintendent termination case.[2] Nebraska law requires that superintendents be evaluated twice in the first year of their employment and annually thereafter.[3] Within one year of the superintendent's employment under a three-year contract, the superintendent was notified that the Board was considering cancellation of his contract due to his incompetence in managing financial affairs of the school district; his mishandling of various special education complaints; and his unprofessional conduct in relation to staff, students, parents, and a board member, including violations of the district's sexual harassment policy. The board's allegations arose during budget time. The board failed to give the superintendent information regarding the board's desires in the budget and ultimately placed him on administrative leave, refused him entry to his office until after office hours, and prohibited him from contacting his staff. Despite these limitations, the superintendent delivered completed budget documents to the board the night of the budget hearing, with only one "not real significant error" in the finalized budget documents. At a hearing regarding the termination of the superintendent's employment, area superintendents and administrators testified that they had made or were aware of other administrators making errors in preparing budget documents. The board finally heard testimony regarding the superintendent's alleged unprofessional conduct. First, a board member testified that she was told by another that the superintendent had made an unflattering and undisclosed remark about her at a staff meeting. The superintendent denied making the remark. The second issue regarding unprofessional conduct arose involving a teacher who stated that on occasion the superintendent touched her and other male and female employees on the knee or shoulder when speaking with them, that he introduced her to another administrator named Julie as "our Julie;" that he jokingly offered to act as a male model at a lingerie party hosted by the teacher; that he would greet the teacher when she entered the teacher's lounge; and that he told her in the context of a budgetary request that the song "What Part of No Don't You Understand?" reminded him of her.

Most importantly, however, what the board did not review at the termination hearing were any performance evaluations, because no evaluations of the superintendent had been conducted by the board during that critical first year of his employment. The only notice was that the board was considering termination for incompetency. In Nebraska, the statute defines incompetency as "demonstrating deficiencies or shortcomings in knowledge of subject matter or…administrative skills."[4] In recognizing that there was no evaluation on file and that the evidence at the board level hearing did not support the board's decision to terminate the superintendent's contract for incompetency, the court stated, "There is a complete absence of evidence to support the Board's decision in this case." The court held that "at the very least" a tenured teacher should be given an opportunity to take whatever action is necessary to avoid giving offense in the future.[5] The court held that the plain language of the statute required that the board provide the superintendent with notice in the form of two evaluations during his first year of employment as to any deficiencies in his work. The superintendent testified that had he known of any problems, he would have immediately modified his behavior. Because the superintendent had no notice of any quarrel with his work or his conduct until the board's action to terminate his employment, the court held that he was given no opportunity to correct any deficiencies. "The plain statutory language does not give the Board the latitude to assume that an administrator should know certain conduct is unacceptable…the statute instead requires that the Board inform the administrator of any deficiencies and give that administrator the opportunity to correct or modify his conduct."[6] The Nebraska Supreme Court therefore reversed the trial court's judgment and remanded the case with directions to enter a judgment in favor of the superintendent, including anything necessary to address the superintendent's damages issues. While the above case concerns a superintendent's job performance, the same standards apply to teachers with tenure or who have some other property right to continued employment, especially when evaluations are statutorily required.

On the other hand, consider the teacher in the Houston Independent School District who had a continuing contract with the district and whose performance was evaluated numerous times during two school years. Evaluations of the teacher's performance included both written assessments and videotaping of the teacher's classroom performance. The videotapes were used so that the teacher could more easily follow and understand the evaluation team's observations and criticisms. At the termination hearing, the school board heard testimony from the teacher's supervisors and reviewed approximately 100 documents regarding the teacher's classroom performance. The board also viewed a 30-minute videotape which included excerpts from five separate videotapes made of the teacher's classroom performance. The court held that both the written evaluations and the videotapes revealed numerous problems with the teacher's performance. The teacher was told of these problems but did not correct and improve her performance.[7] Therefore, the court upheld the board's termination decision.

Judges are not educators; nor are they education evaluators. As such, when there is the existence of an evaluation or assessment procedure and that procedure appears to have been followed, and when there is therefore concrete evidence, whether in the form of an evaluation instrument or other evaluative materials; judges have shown a great deal of deference to educational administrators in determining the appropriate standards of performance of education professionals and other school district employees. As stated by one court, public schools need not be "married to mediocrity" when setting standards for the evaluation of professional employees.[8] Where evaluations are mandatory under state statute, regulations, local policies or contracts; the courts appear to afford a great deal of protection to employees, requiring that the employees be properly evaluated and informed regarding job performance problems so that their deficient performance can be corrected.[9]

It is incumbent upon a board to develop sound policies with regard to evaluations. It is further incumbent upon the campus administrator to follow the policies and procedures as developed. Further, it is necessary that specific job related performance criteria, those that are valid and observable, be used in the evaluation of an employee's performance, so that it is clear that performance that is expected by a supervisor will enable an employee to achieve success in that workplace. Further, it is highly recommended that employees be given advance notice of performance criteria, the priorities and expectations of the administrator, and the procedures which will be followed to minimize the degree of uncertainty in the process and to make it clear that the process is as objective and non-discriminatory as possible.

Implementation of Evaluation Policies

A number of cases have considered whether a claim for failure to comply with evaluation procedures constitutes a constitutional defect. These cases tend to reflect that evaluation problems do not rise to the level of a constitutional violation. While courts often find property rights to employment, there is seldom found a property right to a certain evaluation. The typical due process notion of notice and a hearing before deprivation of a property right therefore seldom applies to an evaluation. Courts have held that federal due process does not entitle any employee to an evaluation or any related procedures, although that may be required under state law or board policy.[10] Furthermore, the courts have held that an evaluation policy established by a school district board of education does not create a right to re-employment by a non-tenured teacher.[11]

The responsibility to implement evaluation policies and to document compliance with those policies is typically the responsibility of the campus principal. In general, the courts adopt a standard called "substantial compliance" in determining whether or not a campus principal complied with required procedures.[12] This standard of "substantial compliance" as opposed to "full and complete compliance" attempts to avoid placing an undue burden on a school administrator.[13] However, failure to comply with essential elements of an evaluation policy can result in reinstatement for school employees when it is determined they have been improperly subjected to inadequate, incomplete, or prejudicial performance evaluations.[14] In order to avoid later contentions that an evaluation system is arbitrary or capricious, it is essential that evaluation criteria be valid and observable and directly related to the job. These job related criteria must be relevant to the job performance and validly related to the requirements of the position.[15]

Elements of Appropriate Evaluation Systems

Employees should also receive advance notice of potential consequences of good and of bad evaluations. While it can certainly be argued that professional employees know the consequences of good and bad evaluations, because different systems hinge on different management decisions based on evaluations, it is essential that employees understand the consequences of evaluations in their school system. The most effective evaluation environment is that in which the supervisor develops a pattern of continual feedback regarding the employee's job performance, so that nothing on a summative performance evaluation comes as a surprise to the employee. This can be done informally, or on a more formal basis through appropriate documentation.

A good evaluation system starts with pre-observation conferences, at which a supervisor informs the employee of the supervisor's criteria, the supervisor's priorities and expectations, and the procedure which will be used. This conference should be documented so that it is clear that the pre-observation conference occurred. At this point, it is appropriate for the employee to have input into that evaluation process. This participation can come in the form of a pre-observation discussion of expectations, plans and goals, or warnings, and should give the employee the opportunity to inform the evaluator of any special circumstances that the evaluator may observe. The pre-observation conference can also help to insure that an employee understands what conduct will be assessed and how it will be assessed so that both the evaluator and the employee can focus on the appropriate elements of the employee's performance.[16]

After the supervisor has observed employee performance, timely notice of specific performance deficiencies that are related to the employee's job performance should be provided to the employee. Those deficiencies should be consistent with the job-related evaluation criteria which were originally established. If they are not, then either those deficiencies do not hinge upon appropriate job performance, or the criteria upon which the evaluation is based should be revised.[17] This timely notice should be in written form, but should also be presented orally to the employee so that a frank person-to-person communication can occur, misunderstandings can be corrected, and expectations can be clarified.

The written document should be closely edited to insure that there are no typographical or other embarrassing errors which could later be presented in any administrative or judicial proceeding. A post-observation evaluation conference should also provide an employee an opportunity to respond to the comments that were made by the evaluator. After the conference, the employee should be provided with an opportunity to respond in writing to unsatisfactory performance evaluations. In some jurisdictions, the employee is allowed to grieve that performance evaluation to the board or beyond, or have some other measure of oversight.[18]

If a campus principal is concerned that an employee will allege that the principal has shown bias in the evaluation of the employee, it is always a good idea for the campus principal to bring in objective third parties to observe the teacher's performance. These observation evaluations by trained evaluators can confirm deficiencies discovered by the principal and can provide additional assistance to the employee in remediating improper job performance. Further, these same evaluators will not be perceived as having the same bias as an on-campus professional. They therefore strengthen evidence that may be presented in any later proceeding.[19] It is likely that a school board or a court would rely to a greater degree on multiple reports by different evaluators which confirm a specific performance deficiency of an employee. Of course, the supervisor does run the risk that an objective evaluator may find an employee's performance to be satisfactory and therefore jeopardize any future remediation attempts or adverse employment actions contemplated by the supervisor. Should such an evaluation occur, it is incumbent upon the campus administrator to seriously review his or her evaluation of the employee's performance to determine whether or not bias does, in fact, exist.

Remediation of Employee Job Performance

It is essential that, as employees are evaluated by an administrator, all employees be evaluated in a uniform manner to avoid claims of bias, and that all employees be given an opportunity to remediate perceived performance deficiencies. In a Fifth Circuit termination case, an employer was held liable for race discrimination against a minority employee who was given consistently good evaluations and pay raises in spite of performance deficiencies. The employee's supervisor stated that the good evaluations were given in an effort to avoid any confrontations with the employee about her work. The supervisor further admitted that he instructed other employees to give her the good evaluations in order to avoid charges of race discrimination by the employee. The Fifth Circuit held that, by ignoring its own evaluation procedures, the employer discriminated against the employee by not giving her the same opportunity to improve her job performance as the employer did of white employees who received honest evaluations.[20]

A remediation plan for the improvement of an employee's job performance should be developed in cooperation with the employee. The remediation plan should note the specific deficiencies that are being targeted, methods by which the employee can remediate the specific job performance areas, and objective criteria for determining whether or not the employee has accomplished the goal of remediating his/her job performance. Finally, a remediation plan should include a time line for remediation of the performance.[21] A reasonable time period for an employee to complete a remediation plan should be allowed. The nature of the performance deficiencies, the nature of the employment, the extent of the person's education and experience, and the egregiousness of the conduct all factor into the amount of time that is required for remediation of performance.[22] For example, it may only take one day to learn to stand at the door and greet students with a smile when they enter. On the contrary, it may take a year to perfect implementation of a new computer curriculum.

What if an employee refuses to cooperate in the development of a growth plan, or objects to the supervisor's expectations? As long as the supervisor is consistent in his or her expectations, it is within the supervisor's discretion to require certain job performance standards. Therefore, while a certain amount of "give and take" is to be expected in the development of the growth plan, a supervisor ultimately can, and should, set job performance standards and expect those standards to be consistently met.

Prior to making an adverse employment decision to nonrenew, nonextend, terminate or demote an employee, it is recommended that all anecdotal records regarding all previous job performance issues, including classroom observations and complaints by parents or fellow workers, be compiled. These anecdotal records and formal and informal reports contribute to the overall weight of the evidence to be accorded an unsatisfactory job evaluation.[23]

Avoiding Legal Claims

The very nature of an employee evaluation system requires that the supervisor discriminate between effective and non-effective employees. It is very important that a supervisor be careful to not illegally discriminate against any employee. Furthermore, it is incumbent upon a supervisor to refrain from any sort of retaliation, especially when an employee has exercised a constitutional or statutory right.

Federal protections against illegal discrimination and retaliation include free speech on matters of public concern;[24] illegal discrimination on the basis of race, national origin, religion and sex;[25] illegal discrimination on the basis of age;[26] or illegal discrimination on the basis of disability.[27] The supervisor must also avoid discrimination or retaliation on the basis of pension interests,[28] wage and hour complaints,[29] workplace safety,[30] garnishment of indebtedness,[31] refusal to submit to a polygraph test,[32] union membership or political party membership,[33] or medical leave for family or self,[34] among others. Depending on the state, numerous state protections and common law protections also exist to protect an employee against illegal discrimination or retaliation.

Recommendations for Practice

- Develop sound evaluation policies and procedures and follow them.
- Apply specific job-related performance criteria that are valid, observable and related to an employee's job performance.
- Give advance notice of performance criteria, priorities and expectations and the procedures that will be used.
- Give advance notice of potential consequences of good and bad evaluations.
- Consider employee input into the process.
- Develop a pattern of continual feedback regarding job performance.
- Proofread all documentation before presentation to employee.
- Timely inform employee of specific evaluation problems orally and in writing.
- Allow employee to respond to evaluations, either orally, in writing, or through a grievance process.
- Evaluate all employees in a uniform manner to avoid the inference of discrimination.
- Do not use an evaluation to retaliate against any employee for any legally-protected conduct or to discriminate based on any legally-protected status.
- Develop a remediation plan in cooperation with the employee, if necessary. Follow-up on the remediation plan with periodic check-ups.
- Provide a reasonable time for the employee to correct deficiencies, with activities actually designed to correct performance problem areas.
- Allow more than one evaluator to observe an employee if there are concerns regarding objectivity or bias.
- Make all employment decisions based on job performance as a whole, using all available documents, including evaluations.
- If making an adverse employment decision, follow all constitutional, statutory and contractual procedures.

References

[1] The author wishes to thank Sarah Donch and Aaron Ford for their assistance in the preparation of this chapter.

[2] Boss v. Fillmore County Sch. Dist. No. 19, 559 N.W.2d 448 (Neb. 1997).

[3] NEB. REV. STAT. § 79-112,111(2) (reissue 1994) (current version at NEB. REV. STAT. § 79-828 (1998)).

[4] NEB. REV. STAT. § 79-12,107(4)(a) (reissue 1994) (current version at NEB. REV. STAT. § 79-824 (1998)).

[5] Hollingsworth v. Bd. of Educ., 303 N.W.2d 506, 512 (Neb. 1981).

[6] *Boss*, 559 N.W.2d 448 (Neb. 1997).

[7] Roberts v. Houston Indep. Sch. Dist., 788 S.W.2d 107 (Tex. Ct. App. 1990).

[8] Briggs v. Bd. of Dirs., 282 N.W.2d 740, 743 (Iowa 1979).

[9] Chicago Bd. of Educ. v. Smith, 664 N.E.2d 113 (Ill. App. Ct. 1996); 559 N.W.2d 448 (1997); Farmer v. Kelleys Island Bd. of Educ., 630 N.E.2d 721 (Ohio 1994).

[10] Atencio v. Bd. of Educ., 658 F.2d 774, 779 (10th Cir. 1981); Wood v.. Indep. Sch. Dist. No. 141 of Pottawa Tomie County, 661 P.2d 892 (Okla. 1983); and Goodrich v.. Newport News Sch. Bd., 743 F.2d 225 (4th Cir. 1984).

[11] King v. Jefferson County Bd. of Educ., 659 So. 2d 686 (Ala. Civ. App. 1995).

[12] McKenzie v. Webster Parish Sch. Bd., 653 So. 2d 215 (La. Ct. App. 1995); Thomas v. Bd. of Educ. of Newark City Sch. Dist., 643 N.E.2d 131 (Ohio 1994).

[13] *Thomas*, 643 N.E.2d 131, 134 (Ohio 1994).

[14] Snyder v. Mendon-Union Dist. Bd. of Educ., 661 N.E.2d 717 (Ohio 1996); 664 N.E.2d 113 (Ill. App. Ct. 1996).

[15] Meyer v. Board of Educ. of Charlotte Maui, 581 N.Y.S.2d 920 (N.Y. App. Div. 1992).

[16] Crump v. Durham County Bd. of Educ., 327 S.E.2d 599 (N.C. Ct. App. 1985).

[17] Iverson v. Wall Bd. of Educ., 522 N.W.2d 188 (S.D. 1994); Hendrickson v. Spartanburg County Sch. Bd., 413 S.E.2d 871 (S.C. Ct. App. 1992).

[18] Holman v. Blueridge Sch. Dist., 405 A.2d 572 (Pa. Commw. Ct. 1979).

[19] Cliff v. Board of Sch. Comm'rs of the City of Indianapolis, 42 F.3d 403 (7th Cir. 1994); Spry v. Winston-Salem-Forsyth County Bd. of Educ., 412 S.E.2d 687 (N.C. Ct. App. 1992).

[20] Vaughn v. Edel, 918 F.2d 517, 523 (5th Cir. 1990).

[21] Kurey v. New York State Sch. for the Deaf, 642 N.Y.S.2d 415 (N.Y. App. Div. 1996); Newcomb v. Humansville R-IV Sch. Dist., 908 S.W.2d 821 (Mo. Ct. App. 1995); Thomas v. Bd. of Educ. of Newark City Sch. Dist., 643 N.E.2d 131 (Ohio 1994).

[22] Gayno v. Indep. Sch. Dist. No. 832, 311 N.W.2d 497 (Minn. 1981); and Mason County Bd. of Educ. v. State Superintendent, 274 S.E.2d 435 (W. Va. 1980).

[23] Seifert v. Lingleville Indep. Sch. Dist., 692 S.W.2d 461 (Tex. 1985); Aigner v. Cass Sch. Township, 577 N.E.2d 983 (Ind. Ct. App. 1991); and Beck v. James, 793 S.W.2d 416 (Mo. Ct. App. 1990).

[24] Pickering v. Board of Educ. of Township High Sch. Dist. 205, 391 U.S. 563 (1968).

[25] 29 U.S.C. § 2000e *et seq*. (1998); 42 U.S.C. § 1981 (1992).

[26] 29 U.S.C. § 631 *et seq*. (1998).

[27] 29 U.S.C. § 793 *et seq*. (1998); 42 U.S.C. § 12101 *et seq*. (1995); 28 U.S.C. § 1875(a) (1998).

[28] 29 U.S.C. § 1140 *et seq*. (1998).

[29] Fair Labor Standards Act, 29 U.S.C. § 215 (1998).

[30] 29 U.S.C. § 660 (1998).

[31] 15 U.S.C. § 1674(a) (1997).

[32] 29 U.S.C. § 2001 *et seq*. (1998).

[33] 29 U.S.C. § 158 (1998); Alaniz v. San Isidro Indep. Sch. Dist., 742 F.2d 484 (5th Cir. 1983).

[34] Family Medical Leave Act, 29 U.S.C. § 2601 *et seq*. (1998).

19

Documentation

Kelly Frels

Introduction

The primary objective of a school district's teacher evaluation system is to improve teachers' performance so they can become more successful and contribute to achieving the objectives of the district. If the evaluation does not produce this positive result, the teacher must be replaced, either by resignation or termination. The district's evaluation system thus serves a secondary function—the removal of the unsatisfactory teacher.

Depending upon the nature of the teacher's contract with a school district, various degrees of procedural due process must be observed in relieving a person of the position if he or she does not resign. In many situations, this process culminates with a hearing before the board of education to determine whether there is cause to terminate the teacher. In teacher termination hearings, principalsers often are met with the claim that there is too little documentation or evidence of help being given to the teacher, therefore, the principal has not done his or her job in working with the teacher. In other cases, the claim is made that the principal has developed so much documentation that the teacher has been harassed. At other teacher termination hearings, complaints are made that the process is unfair and that the teacher did not know of these problems. As a result, some principals have been unwilling to bring a recommendation for termination to the board of education.

In an effort to provide support for the principal and to help ensure the fair treatment of teachers who are evaluated, a simple but effective system of documentation (written communication) has been developed which can be used in conjunction with virtually any school district's evaluation system. This documentation system can be used in districts which utilize the various contractual schemes authorized by state statute. This documentation system is founded on the concept of communication, and its goal is to humanize the evaluation and documentation process with the ultimate objective of improving a teacher's performance to an acceptable level. If a teacher's performance does not improve, the system is designed to provide an incentive for voluntary resignation or, if voluntary resignation is not received, to provide the necessary documentation for the principal to recommend the teacher's termination.

Legal Issues

This documentation system becomes an essential ingredient in preparing the district for a hearing before the board of education; and if necessary, in preparing for appeals and lawsuits filed with a state commissioner of education, an arbitrator, or a court. This system can also provide the necessary documentation to sustain the termination if the teacher files a discrimination complaint with the Equal Employment Opportunity Commission or the Department of Education. Furthermore, adherence to a system of this nature can help prevent constitutional questions from becoming significant issues. If there is a systematic documentation of poor performance before a teacher engages in a protected speech-related activity, the performance deficiency may continue to be addressed as needed and termination can be recommended. In contrast, the absence of such documentation prior to a teacher's engaging in protected speech related activity may render the termination of the teacher extremely difficult.[1]

The documentation contemplated in a teacher evaluation system involves the use of several types of written memoranda which commonly follow some informal verbal communication. First, specific incident memoranda should be used to record conferences with a teacher concerning more significant events. Second, summary memoranda should be used to record conferences with a teacher in which several incidents, problems, or deficiencies are discussed. Third, visitation memoranda should record observations made of a teacher's on-the-job performance. Fourth, an assessment instrument should be used to evaluate the teacher's overall performance.

The documentation concerning a teacher should be used for several purposes. It enables the principal to follow a teacher's actions and performance, thus enabling the principal to pinpoint weaknesses and problem areas. It also enables the teacher to understand problems he or she may have and take corrective steps if necessary. Finally, if a teacher's performance does not improve, it serves as concrete evidence to support a recommendation for termination. Care should be taken to ensure that this process conforms with state law, any relevant bargaining contract and school district board policies.

Memoranda to the File

Whenever a principal observes an incident or behavior which is not of a significantly serious nature to require an immediate conference with the teacher but which should be considered in the teacher's evaluation or at a general conference with the teacher, it is appropriate for the principal to prepare a short file memorandum. If possible, the principal should first mention the concern to the teacher informally. These file memoranda may be in various forms, such as notation on a calendar or in a notebook with separate pages designated for specific individuals. The memoranda should include the name of the teacher, the name of the principal, the date of the occurrence, and the facts of the event observed. These file memoranda can be used for: a conference with the teacher concerning the incident or incidents; assessment of the teacher's performance; and refreshing the memory of the principal for testimony at any proceeding or hearing relative to the teacher's performance. The memoranda should be used sparingly and only for minor matters.

Most administrators who use the file memoranda find it helpful to make the employees aware that these memoranda are being kept and encourage the teachers to review any file memoranda concerning their performance. It is always helpful to effective communication when the principal makes informal mention of the concern as it occurs. Under many states' open records acts, copies of these file memoranda normally need not be given to the teacher unless the teacher requests them. However, if the copies are not given to the teacher, they should not be used in a subsequent hearing in an attempt to establish facts. Actually, the best practice is to incorporate the contents of these file memoranda into a summary memorandum or evaluation which is given to the teacher after a conference.

Even though it may not be the intention of the principal to use these documents as future evidence or to share the file memoranda with the teacher, the memoranda should be written with the knowledge that in a future proceeding, copies may be introduced into the proceeding or made available to the teacher through a request under most states' open records acts. For example, if file memoranda are being used to refresh a principal's memory at a hearing, in most states, the attorney for the teacher is entitled to see copies of the documents. Thus, care should be taken with file memoranda, as with any other memoranda including e-mail to others, not to write or record anything in a manner that could cause future embarrassment. A good practice is to record facts rather than conclusions in file memoranda.

Specific Incidents Memoranda

If the principal observes an incident or behavior, or has a complaint from a third party, it may be appropriate to send the teacher a memorandum concerning the incident. This memorandum should be sent only after the principal conducts any needed investigation and holds a conference with the teacher at which time the incident is discussed and the teacher's viewpoint considered. The memo should summarize the third party's complaint, the teacher's response, the principal's determination, and any directives and reprimands to the teacher. If the incident is serious enough that termination is to be recommended immediately, such recommendation should be stated.

Incidents should be faced head-on, as they occur. The failure to confront problems, infractions, and deficiencies at the time they occur can lessen the chance for corrective action by the teacher or weaken a later case for termination. For example, suppose several incidents occur in the fall of a school year, but they are not mentioned to the teacher by the principal. An attempt to use those incidents to support a proposed termination in the spring of that school year may prove difficult. The teacher will claim that he or she is being treated unfairly because the reasons for termination were not disclosed to the teacher during the school year. Not dealing with the problems as they occur make the principal appear to be arbitrary or devious and weakens the termination proposal.

It is wise to have the teacher acknowledge receipt of the specific incident memorandum by signing the copy. If the teacher does not agree with the facts stated in the memorandum or the action taken, the teacher should be given the opportunity to respond in writing either on the memorandum itself or through a separate document. This action can be accomplished by inviting the teacher to make a written statement concerning any differences of fact or opinion expressed by the principal in the memorandum by a certain date or within a given number of days. For example, the final paragraph of a memorandum might state, "If you disagree with the facts or conclusions stated in this memorandum, please advise me in writing no later than (date) so we can meet and work out any differences." By so doing, any disagreement can be noted, and the differences hopefully resolved, immediately. In serious situations where the employee has proven to be recalcitrant or of questionable veracity, one might consider a final sentence such as, "If you do not respond, I can only assume you agree with the facts stated in this memorandum." Statements such as the latter example should be used sparingly because they tend to polarize the position of the administrator and the employee, thus making future communications more difficult.

If the specific incident concerning the teacher comes from a third party such as a parent or student, care must be taken to fully examine the facts and to determine whether the third party's information is correct. It is improper and potentially disastrous to base a decision to terminate on information from a third party when the truthfulness and reliability of the allegation has not been established. Upon receiving a third party complaint, the principal should make an investigation by conducting whatever hearings are necessary to determine the accuracy of the complaint. An acceptable practice to follow when one receives a complaint from a third party is to get the complaint in writing. The third party should be advised that if adverse action is taken against the teacher based on this incident, the third party must be available to testify before the board, an arbitrator, or a court. If the third party will not agree to appear as a witness, other independent evidence must be available to establish the relevant facts at a hearing. Otherwise, action adverse to the teacher should not be taken. The next step would be to get the teacher's side of the story; usually in a conference with the teacher. If there is a discrepancy in the third party's story and the teacher's story, the principal should attempt to determine what occurred. It may be necessary to have the teacher confront the complainant in an informal conference to determine what actually occurred.

In many cases, it will simply not be possible for the principal to have agreement concerning what happened, so the principal must determine whose story he or she believes. If agreement can eventually be reached, or if the principal has enough facts to make an accurate determination, a specific incident memorandum can be prepared. Such a memorandum should explain the findings made by the principal and the reasons for those findings. Specific directives or suggestions to the teacher might be included in the memorandum if appropriate.[2]

Visitation Memoranda

In some school districts, it is common practice for principals to summarize a visit to a teacher's classroom. If visitation forms or checklists are used or if a visitation memorandum is prepared, the content should be reviewed with the teacher, and the teacher should be given a copy. Suggestions for improvement should be made in a conference and noted in the memorandum. A visitation memorandum may be used in a termination process, but usually the results of a visitation are reviewed in a summary memorandum or in the assessment document.

Summary Memoranda

Summary memoranda are ideal ways to outline the results of conferences concerning several incidents, classroom visitations, or conferences regarding general teacher performance. Through such memoranda, the matters referred to in the file memoranda can be incorporated. Matters not reflected in other memoranda can be reduced to writing, directives can be given to the teacher, and standards can be established. Also, evidence that a conference was held and the subjects discussed can be established. A copy of each summary memorandum should be given to the teacher after the conference, and the teacher should acknowledge receipt of the memorandum. The teacher should be given an opportunity to offer in writing any differences with the facts and conclusions stated in the memorandum. If a teacher disagrees and files a response, a subsequent conference should be held to try to resolve any differences which may exist. The same comments applicable to the specific incident memoranda are applicable to summary memoranda with the major difference being that summary memoranda are designed to cover general conferences with the teacher on several matters rather than on a specific incident.

Evaluation Document and Close-Out Memorandum

The assessment or evaluation of performance document should be completed as prescribed by the policies and procedures of the district. A summary narrative or memorandum should be considered for each negative assessment noted in the document. If the assessment is such that the teacher might be terminated if no improvement is shown, the teacher should be advised that failure to improve could result in a recommendation for termination. Furthermore, it is wise to include instructions or specific directions for improvement. Such a practice not only is helpful to the teacher but also strengthens the argument that the teacher has been treated fairly if the principal's actions are correct and later questioned. Through the use of such evaluation documents, the teacher will be informed that he or she has deficiencies which could result in a proposal to terminate should those deficiencies not be remedied according to the instructions given for improvement. All identified deficiencies of the teacher and any problems which have been encountered during the assessment period should be included in the assessment document. If a deficiency from previous years has not been remedied by the teacher, it should also be noted in the assessment. In order to avoid difficulties with ratings on the evaluation, a straightforward and truthful assessment should be made. A fair system of evaluation requires the setting of standards and expectations at the beginning of the school year with the principal following through with the implementation of those standards through the evaluation process.

If the communication in the conference is effective, and it is properly reflected in the memorandum, a teacher will rarely have the occasion to respond again. However, a further response from the teacher sometimes does result, and another conference may be necessary. At some point the memorandum writing must be brought to a close, and in informal circumstances, the sending of the close-out memorandum to this conference may be appropriate. The language in the close-out memorandum inviting a response from the teacher is deleted, and the teacher is advised that the matter should be considered closed.

Recommendations For Practice

- The memorandum should be sent only after a conference with the teacher.
- In preparing any memorandum, reliance should be made on the facts. Conclusionary statements not supported by the facts should be avoided. For example, in a classroom visitation memorandum, the observation that the teacher's classroom was disorderly, without any explanation, is not very specific or effective. Rather, the principal should note that he or she saw three children in the classroom talking during class and saw one child playing in the back of the room. The principal should note that these acts were unnoticed by the teacher or were not corrected by the teacher.
- In preparing a memorandum, inflammatory words should not be used. For example, rather than to characterize an action as insubordination, the action might be factually described, and the teacher's action should be referred to as a failure to comply with specific official directives or school board policy.
- Directives given in a memorandum should be positive and specific, and educational jargon should be avoided. For example, when directing a sometimes tardy teacher to arrive at school on time, state: "You are required to be at school by a specific time, and you will be expected to have signed in by that time," rather than, "You are required to be at school on time." Instead of directing that: "Your lesson plans are due once a

week," one might state, "Your lesson plans are due in my box by 4:00 p.m. on each Friday, and I expect you to have them there beginning Friday." When written in a constructive manner, precise directives like these tend to avoid real or imagined confusion about what is expected.

- The specific incident memorandum, the summary memorandum, the visitation memorandum and the assessment document should be personalized as much as possible. The use of "we" or "they" should be avoided unless two or more people are involved and then they should be identified by name. The key to the success of this documentation system is to provide an opportunity for the principal and the teacher to sit down and mutually work out the problem and determine the future actions of the teacher.
- Care should be taken to treat all teachers alike, especially when dealing with absences and tardiness. It is embarrassing and potentially destructive to have a teacher's attorney present a school's sign-in sheet at a hearing to show that other teachers have more tardies and more absences than the teacher who is being proposed for termination for excessive tardiness and absences.
- One should never write a memorandum to a teacher when one is angry. It is much better to reflect for a day or so or to call in a third party to review a memorandum prior to sending it. By doing so, the principal can avoid statements which might be regretted later.
- In order to be effective, any memorandum must be prepared and sent to the teacher soon after the incident and the subsequent conference occur. Under no circumstances should a memorandum be prepared after the decision to terminate has been made and backdated to reflect the incident upon which the proposed termination will be based.
- The evaluator should be careful to ensure that the teacher believes he or she has been fairly treated. One should remember that if the teacher's performance does not improve and a recommendation for termination is made, the fairness of the process will be judged by the members of the board and, possibly, by the state's commissioner of education, an arbitrator, or a judge. In insuring that a teacher has been treated fairly, one should attempt to make an evaluation from the perspective of a reasonable person who, after receiving all the facts, determines that the process was fair. Another helpful standard for judging fairness is for the principal to treat the teacher as the

principal would like to be treated if he or she were in the same circumstances.

- Normally the only documents which would be used as documentary evidence at a termination hearing would be the summary memoranda and the evaluation or assessment instruments. Occasionally, specific incident and visitation memoranda would be included; however, these specific incident and visitation memoranda should be reviewed and included in a subsequent summary memorandum or evaluation instrument. If the teacher does not receive a copy of a memorandum to the file, it should not be used as evidence at a hearing but should be used only when necessary to refresh the principal's memory while testifying concerning the specific facts of an event.

References

[1] For a more complete review of how to prevent First Amendment problems, *see* K. FRELS and M. SCHNEIDER-VOGEL, THE FIRST AMENDMENT AND SCHOOL EMPLOYEES: A PRACTICAL MANAGEMENT GUIDE, NOLPE Monograph (1986).

[2] For more detailed treatment of investigating alleged wrongdoing by employees, *see* R.E. BUMP, K. FRELS, and J. HORNER, INVESTIGATING ALLEGED WRONGDOING BY EMPLOYEES IN THE SCHOOL SETTING.

20

Teacher Dismissal

R. Craig Wood, Luke M. Cornelius,
and Sarah L. Mendonca

Introduction

The authority to evaluate and dismiss public school employees rests in the implied and delegated authority of local boards of education. These powers are derived from the state legislatures' expressed powers to maintain and operate public schools. As part of this dismissal process, the building principal must understand and follow certain procedures in making dismissal recommendations to the local board of education. School administrators who fail to understand this critical area, and especially the constitutional issues involved, place themselves and their employing school board at risk of adverse litigation.[1]

State legislatures outline specific procedures that must be followed for certification and employment and the process of dismissing a public employee. Tenure does not protect an individual from examination and evaluation of his or her performance nor from possible dismissal. States guarantee due process and safeguards within the dismissal framework through statutes, rules, and regulations. Administrators charged with the dismissal of teachers must take a variety of legal issues into consideration.

Legal Issues

First Amendment and Free Speech

The courts have consistently ruled that teachers have a constitutional right to speak out on matters of public concern.[2] This right is embodied in the First Amendment to the United States Constitution and includes the right to criticize school board policies as well as school administrators and their policies. Thus, teachers cannot be dismissed merely for publicly disagreeing with school officials. Therefore, the teacher's exercise of this right to free speech must not have been the motivating factor for termination or dismissal.[3]

This protection applies to all employees, tenured and nontenured alike. At the same time, not all teachers' speech is protected. Speech that does not directly address an issue of public concern and which impedes the efficient operation of the school may still be grounds for termination. Furthermore, the school does have the right to regulate speech content when it is directly pertaining to the school curriculum.[4]

Nontenured Teacher Dismissal

A distinction is made between the rights and dismissal procedures of nontenured versus tenured teachers. Tenured teachers, those who have completed the appropriate probationary period, are granted a permanent or continuing contract and are entitled to due process in employment decisions. They are subject to reduction-in-force and may be dismissed in accordance with the tenure laws of their specific state.

Typically, nontenured teachers are provided a term contract. During that time, they are not entitled to—nor are they protected by—the dismissal procedures found within the tenure statutes.[5] They may be nonrenewed during the probationary period at the end of their contract. Both teachers and administrators are subject to the specifics of contract law.[6] The teacher is nonrenewed upon fulfillment of the current contract and upon timely notification by the board of education that they will not be rehired.[7] However, there is a clear legal expectation that the school district has acted in good faith.[8] When it can be demonstrated that the school district did not act in good faith, the teacher may have legitimate grounds to contest the dismissal.

Nontenured teachers are not without rights or protections. They do retain their constitutional rights and care must be taken not to violate these rights. Also, statutes in some states may require automatic renewal if the teacher was not informed of non-renewal by a certain date and may require a stated reason for the non-renewal. The building principal must understand the entire process of termination of nontenured teachers and the rights that these individuals possess. For dismissal of nontenured teachers, the principal must be aware of the following: the language in the employment contract that specifically addresses the nature of the position and time of service; the specific time frames under contract law including the contract renewal provisions for the teacher; and the constitutional rights of the teacher[9]

Tenured Teacher Dismissal

With its plenary powers, state legislatures provide specific reasons for dismissing tenured teachers. These reasons may include incompetence, immorality, insubordination, incapacity (which includes neglect of duty and unprofessional conduct), and criminal conduct. Specific reasons, tied to "just cause" clauses in collective bargaining agreements, can be used where evidence clearly supports the building principal and the district administration. The courts also apply constitutional protections to tenured teachers, as well as associational rights of unions or association membership where provided.

The specific meaning of incompetency depends on individual state statutes. The courts have allowed broad definitions of the term. Incompetency is measured against a standard requirement for individuals performing the same or similar duties. Incompentency is defined as the "lack of ability, legal qualification, or fitness to discharge the required duty."[10] Incompetency may signify a lack of a proper teaching certificate, a lack of knowledge of subject matter, a lack of ability to establish reasonable discipline in class, a deficiency in teaching methodology, or an emotional instability that demonstrates an inability to effectively teach students.[11]

Tenured teachers may be legitimately dismissed for incompetency.[12] In the dismissal process, it is the building principal and district officials who must substantiate charges of incompetence. The aspects of dismissal are similar in all states, but specific procedures and time frames may vary according to state statutes. Two major problems arise with the use of incompetency for dismissing tenured teachers. The first is the concept that a teacher, once granted a certificate, is deemed by statute to be competent in knowledge of subject matter and pedagogy. The second is the idea that, upon completing the probationary period and being granted tenure by the district, the individual is competent. With these assumptions, it falls upon the district administrative personnel, and the building principal in particular, to clearly demonstrate the incompetency of the individual. It must be emphasized that incompetency is evidenced by a variety of issues, and it is vitally important that the principal maintain clear and precise documentation to substantiate any potential charges.

Immorality is a term that often creates confusion in contemplating reasons for dismissal. It is important to note that immorality is not confined to sexual misconduct. Immorality is defined as any action which, according to the standards of the community, is deemed to be "inimical to public welfare."[13] Thus, any activity that constitutes corruption or indecency may be grounds for dismissal under a charge of immorality. The standards of immorality may never clearly articulate what is and what is not permitted in the private lives of public school teachers. The Pennsylvania Supreme Court has defined these actions as being "[a] course of conduct as offends the morals of the community and [a] bad example to the youth whose ideals a teacher is supposed to foster and to elevate."[14] In instances of alleged immorality, the district must show that a "grievous assault" on community mores has occurred.[15] This grievous assault is difficult to prove, and great care must be exercised in developing the case. For example, teachers are sometimes dismissed for criminal activity that takes place outside of the educational arena.[16] In such cases, the link between the criminal activity and the teacher's effectiveness must be clearly demonstrated.

A public school teacher serves as a role model for students. The teacher should therefore possess and exhibit the commonly accepted social and moral standards that exist within a community. When a conflict exists between the rights of the individual and the role of an exemplar, building principals must clearly demonstrate that the private actions of a classroom teacher are directly linked to the teacher's effectiveness in the teaching and learning process. Courts will not support the dismissal of public school teachers where there is no clear connection between the immoral conduct and the teacher's classroom performance.[17] Factors that the courts consider in weighing their decision include: the age and maturity of the students involved; the likelihood that the teacher's conduct will have adversely affected students or other teachers; the degree of the anticipated adversity; the proximity or remoteness in the time of the conduct; the type of teaching certificate held by the party involved; extenuating or aggravating circumstances surrounding the conduct; the likelihood that the conduct may be repeated;[18] the motives underlying the conduct; and the extent to which disciplinary action may inflict an adverse impact or a chilling effect upon the constitutional rights of a teacher involved or other teachers.[19]

The link between action and evident unfitness to teach must be clearly established. Where such a link is not made, even where the teacher was a respondent in an adulterous divorce action, the court will not sustain a dismissal or revocation of a certificate.[20] Likewise, courts have generally refused to recognize the pregnancy of unwed mothers as ground for termination on the basis of immorality.[21] However, this link has been made in a case where the teacher was dismissed for shoplifting.[22]

Insubordination by public school teachers is the willful disregard of—or refusal to obey—reasonable directives.[23] Dismissals for insubordination have not been upheld when: the alleged misconduct was not proven; the existence of a pertinent school rule or a superior's order was not proven; the teacher's motive for violating the rule or order was admirable; no harm resulted from the violation; the rule or order was invalid as beyond the authority of the maker; the enforcement of the rule or order revealed possible bias or discrimination against the teacher; or the enforcement of the rule or order violated constitutional rights.[24] A building principal may issue directives to the staff for activities relating to the educational functions of the school. However, these directives must be reasonable and rational, must not be trivial, and must not infringe upon the legal rights of individuals. Teachers should be aware that insubordination may consist of a single incident of willful or intentional disobedience.[25] Furthermore, teacher tenure does not limit the ability of the school district to dismiss a teacher for insubordination.[26]

Incapacity encompasses issues relating to the ability and proficiency to teach in the public schools. The term is used to mean "want of legal ability to act" and has been construed to include inefficiency.[27] Charges of incapacity are often coupled with claims of incompetency and neglect of duties. Without evidence of an infringement upon constitutionally protected freedoms, the courts give boards of education great latitude in determining what activities constitute nonperformance.[28] These conditions range from lack of pupil discipline and failure to keep proper and timely records, to the inability to convey knowledge to their students. Corporal punishment is often evidence of incapacity and unprofessional conduct, especially where the student has been harmed excessively or where such actions are contrary to school board policy or state statute.[29] However, boards of education must still establish a clear link between the teacher's alleged conduct and his or her teaching ability. On the other hand, where a charge of unprofessional conduct involves sexual contact with a student or deviant sexual actions, the board of education must only prove that the conduct existed.[30] Whatever the claim, all such charges must be clearly established and documented by the board of education.

Conduct judged to be so deficient that it seriously harms the teacher's effectiveness need not be tolerated by a school board and building principal. In these instances, dismissal can occur without attempts to remediate such behavior. Illustrative of this concept is the case where a classroom teacher repeatedly, and purposefully, struck male students in the genitals.[31] After suspension with pay, an investigation revealed that the teacher had struck at least four male students. The board of education dismissed the teacher without prior warnings nor a period of probation. In upholding the board's action, the court viewed the behavior as so offensive to warrant dismissal without remediation.

Neglect of duty is an offshoot of incapacity. It is usually interwoven with other charges stemming from incapacity and including unprofessional conduct. Neglect of duty may include failure to follow curriculum guides, failure to maintain adequate discipline, failure to follow prescribed teaching lessons, and similar reasons.[32] Neglect of duty usually entails carelessness on the part of the employee. This action differs from insubordination where an employee blatantly disregards the specific directives of administrators or school boards.

Occasionally, public school teachers are arrested on felony charges, meaning they have committed a crime of a "graver or more atrocious nature than those designated as misdemeanors."[33] Such arrests may not necessarily have a direct bearing on classroom performance. However, by state statutory requirements, the conviction of a felony may be grounds for permanent loss of a teacher's license because it demonstrates an "evident unfitness to teach" within the public schools. In general, the courts support the dismissal of teachers for felony convictions.[34] However, such dismissal is contingent upon conviction, not merely indictment.[35]

Due Process: Procedural and Substantive

A major difference in the dismissal of tenured and nontenured faculty is the application of due process requirements for tenured faculty. These requirements include both procedural due process and substantive due process and must be followed by school administrative personnel and local boards of education. Procedural due process ensures that the "parties whose rights are to be affected are entitled to be heard, and in order that they may enjoy that right, they must be notified."[36] Substantive due process is broadly defined as "the constitutional guarantee that no person shall be arbitrarily deprived of his life, liberty or property" and shall be protected "from arbitrary and unreasonable action."[37]

Procedural due process consists of several elements. The first element is that of notification. By applicable statute, the classroom teacher must receive written notification and the specific reason cited in order for the notice of dismissal to be valid. This notification must conform with all applicable dates and manner as to its delivery. The second element is the provision of a fair and impartial hearing. The classroom teacher must be afforded an opportunity to be heard, to examine and refute any evidence on which the decision is based, and to have an opportunity to discredit such evidence and judgments by cross-examination and confrontation of witnesses. Fair hearings occur at several levels. This process begins with the building principal and ends with the board of education. This process provides the assurance that the classroom teacher has multiple opportunities to be heard and forestalls charges of inadequate due process.

During the dismissal process, the board must demonstrate the cause of the dismissal and must follow the appropriate due process procedures.[38] In this process, the building principal has the specific responsibility to ensure that all evaluations, conferences, and remediation are documented; are related to the specific deficiencies of the teacher; and are shown to be fair and reasonable. Courts have held that dismissals are permissible as long as an individual's constitutional rights are not violated. Courts have reasoned that if terminations are for permissible reasons and are not arbitrary, capricious, or unreasonable; they are legally defensible.[39] In fact, the dismissal may stand even if the constitutional infractions were merely "incidental."[40]

Classroom teachers have a property right to the reasonable expectation of future employment with the granting of tenure.[41] A teacher's continuing contract cannot be breached by the school board without procedural and substantive due process. A liberty interest under the Fourteenth Amendment guarantees against invasion without due process of law. School teachers have a liberty interest in their good name and professional reputation. If administrators or school board members stigmatize a teacher's professional reputation and thus prevent the teacher from pursuing and attaining another professional position; there is a violation of this liberty interest and due process is necessary. The United States Supreme Court addressed the issue of property rights through tenure and the liberty interests of employees.[42] The Court noted that while liberty interests are "broad and majestic," the board did not harm the teacher's "good name, reputation, honor, or integrity" in nonrenewal of his teaching contract. If a board does not stigmatize a nontenured teacher's professional reputation and where state statutes allow for such a procedure, a board of education may nonrenew this teacher.

Reduction-in-Force

In the face of declining enrollments and the resultant loss of financial support, boards of education are under no obligation to retain unneeded staff. Regardless of the terminology used, reduction-in-force (RIF) is the suspension of a tenured or nontenured classroom teacher for reasons unrelated to performance.[43] However, if a teacher's classroom performance led to the decline of enrollments, such dismissal or nonrenewal may be legitimate under the RIF statutes or nonperformance statutes.[44]

Fiscal insolvency is the most frequently cited reason for engaging in RIF. When fiscal insolvency is claimed, counter-claims center on a determination of the validity of the fiscal data. Each state has its own definitions and manner for determining fiscal insolvency.[45] Regardless of the definitions used, whenever fiscal insolvency is claimed, the board of education must substantiate its actions using empirical evidence. Numerous cases illustrate the need for clear and precise information to justify and defend the decisions that lead to the dismissal of an employee due to budgetary constraints. When the claim of fiscal insolvency is supported by these data, courts will uphold the decision of the board of education. In implementing RIF, the building principal, district administration, and the board of education must not engage in any activity which is arbitrary, capricious, or unreasonable.

The complex issues of seniority and the right to "bump" teachers are often interwoven with state statutes via local collective bargaining agreements. Some state courts have ruled that, in matters of RIF, seniority extends to nontenured teachers and is the sole criteria for RIF.[46] Other courts have ruled that nontenured teachers, by virtue of their noncontinuing and nontenured status, do not possess seniority rights.[47] As a general rule, the school board may "bump" those teachers who possess less seniority within their certification areas. These issues are highly dependent upon state statutes and existing collective bargaining agreements.[48] Thus, the building principal must be familiar with the collective bargaining agreement as well as the appropriate statutory requirements. In dealing with the concerns of due process and RIF, the building principal must have a broad base of knowledge about curriculum planning, enrollment projections, and potential retirements; as well as course demands, cross certifications, and the overall staff needs prior to the time of RIF.

Recommendations for Practice

For evaluation and possible dismissal of teachers, the principal must be mindful of a number of issues that may create problems in the dismissal process. To minimize the risk of legal liability, the following guidelines should be observed:

- Maintain objectivity in all areas of the evaluation process.

- Establish standards and criteria for evaluation that are validated as accurate measures of the performance under observation.
- Maintain evidence of the teacher's failure to perform and the influence of the teacher's behavior on students, staff, and community. Document all meetings and conversations with the teacher.
- Maintain records of the specific recommendations and evidence of the degree to which the teacher met these recommendations.
- Establish the link between the behavior or alleged incompetence and the effect on the teacher's performance.
- Be aware of the difference between assistance offered to the teacher (as well as evaluation and follow-up) and harassment. Document what was done and what you expect to do, as well as the time frames and follow-up activities.
- Be aware of the community standards for personal and professional behavior of the teaching staff.
- Document the directives given to the teacher, the time frames for improvement or compliance, the follow-up procedures, and the findings necessary to validate the compliance of the teacher.
- Avoid any action that may be a violation of the constitutional rights of teachers.
- Do not take action precipitously and without thorough investigation unless absolutely necessary (i.e., threats to the safety of students and staff), and
- Whenever possible, consult with district legal counsel before taking final action.

References

[1] Greminger v. Seaborne, 584 F.2d 275 (8th Cir. 1984).

[2] Pickering v. Board of Educ., 391 U.S. 563 (1968); Hall v. Marion County School Dist., 860 F. Supp. 278, *affirmed* 31 F.3d 183 (D.S.C. 1993), Gardetto v. Mason, 100 F.3d 803 (10th Cir. 1996).

[3] Mt. Healthy v. Doyle, 429 U.S. 274 (1977); Connick v. Myers, 461 U.S. 138 (1983); Waters v. Churchill, 511 U.S. 661 (1994).

[4] Boring v. Buncombe County Bd. of Educ., 98 F.3d 1474, *rehearing granted, opinion vacated* (4th Cir. 1996).

[5] Lewis v. Bd. of School Trustees, 657 N.E.2d 180, *rehearing denied* (Ind. Ct. App. 1995).

[6] U. S. Const., Art. I, §10; State *ex. rel.* Anderson v. Brand, 303 U.S. 95 (1938); Clark v. Mann, 562 F.2d 1104 (8th Cir. 1977).

[7] *See, e.g.*, Leola Sch. Dist. v. McMahan, 712 S.W.2d 903 (Ark. 1986); Branch v. School Dist., 432 F. Supp 608 (D. Mont. 1977).

[8] Axelson v. Hillsboro Union High Sch. Dist., 898 F. Supp. (D. Or. 1995).

[9] *See, e.g.*, Harris v. Florence City Bd. of Educ., 568 So. 2d 827 (1990); Coats v. Pierre, 890 F.2d 728, *rehearing denied, certiorari denied* 111 S. Ct. 70 (5th Cir. 1989).

[10] Black's Law Dict. 688 (5th ed. 1985).

[11] *See, e.g.*, Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064 (3d Cir. 1990); Busker v. Board of Educ., 295 N.W.2d 1 (S.D. 1980).

[12] Sekor v. Board of Educ., 689 A.2d 1112 (Conn. 1997).

[13] Black's Law Dict. *supra* note 10, at 885.

[14] Horosko v. Mt. Pleasant Twp. Sch. Dist., 6 A.2d 866 (1939), *cert. denied*, 308 U.S. 553 (1939).

[15] Penn-Delco Sch. Dist. v. Urso, 382 A.2d 162 (1978); Adams v. State Professional Practices Council, 406 So. 2d 1170 (Fla. Dist. Ct. App. 1981), *petition denied* 412 So. 2d 463 (Fla. 1982).

[16] Board of Directors of Lawton-Bronson v. Davies, 489 N.W.2d 19 (Iowa 1992); Satterfield v. Board of Educ., 556 N.W.2d 888 (Mich. Ct. App. 1996).

[17] Alford v. Ingram, 931 F. Supp. 768 (M.D. Ala. 1996).

[18] *See, e.g.*, Toney v. Fairbanks, 881 P.2d 1112, (Alaska 1994).

[19] Governing Bd. v. Haar, 33 Cal. Rptr.2d 744 *review denied*.

[20] Erb v. Iowa State Bd. of Public Instr., 216 N.W.2d 339 (Iowa 1974).

[21] Avery v. Homewood City Bd. of Educ., 674 F.2d 337 (5th Cir.1982), *cert.denied*, 461 U.S. 943 (1983); Andrews v. Drew Municipal Separate Sch. Dist., 507 F.2d 611 (5th Cir. 1975), *cert. granted*, 423 U.S. 820 (1975), *cert. dismissed*, 425 U.S. 559 (1976); *See generally*, Acanfora v. Board of Educ. of Montgomery County, 491 F.2d 498 (4th Cir. 1974); New Mexico State Bd. of Educ. v. Stoudt, 571 P.2d 1186 (N.M. 1977).

[22] *Davies*, 489 N.W.2d 19 (Iowa 1992).

[23] School Dist. No. 8, Pinal County v. Superior Court, 433 P.2d 28 (1967). *See also*, Alderstein v. Board of Educ. of New York City, 485 N.Y.S.2d 1 (N.Y. 1984).

[24] 78 A.L.R.3d 83-87.

[25] Gaylord v. Board of Educ, 794 P.2d 307 (Kan. Ct. App. 1990).

[26] *In re* Termination of James E. Johnson, 451 N.W.2d 343, (Minn. Ct. App. 1990).

[27] Black's Law Dict. *supra* note 10, at 902.

[28] Saye v. Saint Vrain Valley Sch. Dist., 785 F.2d 862 (10th Cir. 1986); Kizer v. Darchester County Vocational Educ. Bd. of Trustees, 340 S.E.2d 144 (S.C. 1986).

[29] W. M. v. Dept. of Health and Rehabilitative Serv., 553 So. 2d 274 (Fla. 1989).

[30] Tomerlin v. Dade City Sch. Bd., 318 So. 2d 159 (Fla. Dist. Ct. App. 1975); Wishart v. McDonald, 500 F.2d 1110 (1st Cir. 1974).

[31] Mott v. Endicott Sch. Dist., 713 P.2d 98 (Wash. 1986).

[32] *See, e.g.*, Harvey v. Jefferson County Sch. Dist., 710 P.2d 1103 (Colo. 1985).

[33] Black's Law Dict. *supra* note 10, at 744.

[34] *See, e.g.*, Bertrand v. New Mexico State Bd. of Educ., 544 P.2d 1176 (N.M. 1975); Skripchuk v. Austin, 379 A.2d 1142 (Del. Super. Ct. 1977).

[35] Clark v. School Bd. of Lake County, Florida, 595 So. 2d 735 (Fla. Dist. Ct. App. 1992).

[36] Black's Law Dict. *supra* note 10, at 1083.

[37] *Id*. at 1281.

[38] *See*, Nelson v. Board of Educ. of Doland Sch. Dist., 380 N.W.2d 665 (S.D. 1986) (state tenure statutes creates a contractual obligation); *See, e.g.*, State *ex rel*. Anderson v. Brand, 303 U.S. 95 (1938).

[39] Johnson v. Board of Regents, 337 F. Supp. 227 (Wis. 1974); *see* Smith v. Board of Educ., 334 N.W.2d 150 (Iowa 1983).

[40] Sheets v. Stanley Community Sch. Dist., 413 F. Supp. 350 (D.N.D. 1975).

[41] For claims involving expectations by nontenured teachers, *See* Sullivan v. School Bd. of Pennellas County, 773 F.2d 1182 (11th Cir. 1985); Carmichael v. Chambers County Bd. of Educ., 581 F.2d 95 (5th Cir. 1978).

[42] Board of Regents v. Roth, 408 U.S. 564 (1972).

[43] For a discussion of reduction-in-force, *See*, *Reduction in Force*, R. C. Wood, D. C. Thompson, L. Picus, and D. Thaupe, Principles Of School Business Management, 2nd ed., 10.1-10.32, ASBO (1995) and D. C. Thompson and R. C. Wood, *Budget Planning* in Money And Schools, Eye on Education (1998).

[44] *In re* Gaetjens, 485 A.2d 1057 (N.H. 1984).

[45] *See, e.g.*, Washington Teacher's Union v. Board of Educ., 109 F.3d 774; Zoll v. Eastern Allamakee Comm. Sch. Dist., 588 F.2d 246 (8th Cir. 1978).

[46] Alexander v. Delano, 188 Cal. Rptr. 7095 (Ct. App. 1983); Bohman v. Board of Educ. of West Clermont, 443 N.E.2d 176

(Ohio 1983); Carmody v. Board of Directors, 453 A.2d 965 (Pa. 1982).

[47] *See, e.g.*, Lezette v. Board of Educ., 319 N.E.2d 189 (N.Y. 1974); Hill v. Dayton Sch. Dist., 532 P.2d 1154 (Wash. 1975).

[48] Fort Summer Mun. Sch. Bd. v. Parsons, 405 P.2d 366 (N.M. 1971); Penasco Indep. Sch. Dist. v. Lucero, 526 P.2d 825 (N.M. 1974); Karback v. Board of Educ. of Comm. Unit Sch. Dist., 428 N.E.2d 1126 (Ill. 1981).

21

Teacher Certification

William E. Sparkman, Ed Irvin, and Fred Hartmeister

Introduction

Principals should check the validity of the teachers' certificates in his/her building on a yearly basis even though the central office generally monitors the status of teachers' certification. This step is particularly true when a teacher on the staff is employed under a provisional endorsement or a temporary or emergency certificate valid for only one year. An individual teacher may lose employment if not properly licensed. As a result, school culture and climate will most likely suffer. The most important issues related to certification are defined by individual state statutes and administrative regulations. They are governed by the case law of the individual states. Principals should be very familiar with their respective state laws related to certification. A brief discussion of a few cases demonstrates the importance of monitoring the licensure of certified staff, including the principal. The cases illustrate how different state laws can lead to contradictory conclusions.

State legislative statutes and administrative regulations govern teacher certification. While these statutes and regulations are state specific, there are some general principles that emerge from case law. There are three primary areas of concern in teacher certification: the basis of the state's authority and interest in teacher certification, the relation of certification to employment, and the reasons and processes necessary for the revocation of a certificate. Since teacher certification is governed mostly by state, rather than federal law, it is highly state specific. Principals should only rely on the case law from their individual state.

Legal Issues

State Authority and Interest in Certification

States certify competency of teachers through a state regulatory agency. The authority to regulate is described by a state court in

Kansas as: "The State Board of Education is statutorily the only agency authorized to set standards for teacher certification. Certification by the State Board of Education, rather than subjective qualifications set up by each local school board, determines that a teacher is qualified to teach subjects endorsed on the teaching certificate."[1] Teaching certification is an acceptable method of satisfying a state constitutional mandate for the legislature to supply an education for youth.[2] According to an Illinois judge, "the predominate purpose in licensing a trade or profession is to prevent injury to the public by assuring that the occupation will be practiced with honesty and integrity and by excluding those who are incompetent or unworthy."[3] A Nevada court has held that the legislative intent behind the statutory procedures related to teacher certification was twofold: "First, the provisions were intended to provide an efficient procedure for finding and employing qualified teachers.... Second, the legislature wanted to protect qualified teachers from arbitrary decisions regarding their employment."[4]

Legal challenges have been mounted in several states by churches operating private, sectarian schools. State authority over church schools and state interest over teacher certification are the major issues. These cases question whether such authority and interest are sufficient to allow the state to limit individual rights regarding the free exercise of religion. In Iowa, individuals involved in church-sponsored schools argued unsuccessfully in court that the state certification requirements burdened their First Amendment free exercise rights. In speaking about the relationship between the state's interest in education and teacher certification requirements, a federal judge wrote: "[t]he importance lies, not in the piece of paper itself, but in the education a person must receive to become eligible for the certificate...[T]his kind of knowledge is essential if one is to become a good teacher."[5] The court's conclusion was that Iowa's interest in requiring all teachers to be certified was sufficiently compelling to override the plaintiff's First Amendment claim that teachers in sectarian schools should not be subjected to such regulation.[6]

The parents of three school age children were convicted of violating the North Dakota compulsory education law. They believed that God had given them the responsibility for their children, including their education. This belief required them to teach their children at home. Because it required government approval for religious schools and it required religious schools to only employ teachers certified by the state, the parents argued that the compulsory attendance law violated the Establishment Clause. This attack was unsuccessful.[7]

Actions related to certification must be neutral with respect to race, color, sex, religion, and national origin. Consequently, certification requirements must be applied in a nondiscriminatory manner.[8] The United States Supreme Court has sustained the authority of the states to enact laws requiring resident aliens to produce evidence of their intention to become naturalized citizens of the United States before they are issued a teaching certificate.[9] Certain types of loyalty oaths, such as: "I solemnly swear or affirm that I will support the Constitution of the State of Colorado and of the United States of America and the laws of Colorado and the United States," have been upheld by the courts.[10]

Teacher Certification and Employment

A teaching certificate is a license and not a contract. A license "confers no more than a mere expectancy of employment, and does not confer any claim to a specific position, or, for that matter, to any further employment."[11] Although the possession of a teaching certificate does not guarantee employment in a school district, it is required in order for the teacher to be a competent party to an employment contract and to be paid by the school board.[12] The certificate may be an essential condition of an employment contract. For example, a court in Illinois found that a school board was no longer bound by an employment contract where the teaching certificate of a substitute teacher had expired.[13] When California allowed waivers for credentials, a probationary employee had no statutory right to reemployment if the employee failed to make progress toward obtaining the required credential.[14] An Illinois court held that salary benefits under an employment contract may be calculated on the basis of the type of certification held rather than the actual position of employment.[15] Finally, the issue of timing in seeking an alternate certificate has arisen where teachers are required to obtain permanent certification to retain a position. At least one court has held that time requirements must be met and backdating after the expiration of a provisional certificate is not satisfactory.[16]

A question that is often troubling to educators is whether or not the state can change certification requirements. This point was highlighted in an Indiana case involving the revocation of a teacher's certificate. In upholding the revocation, the judge wrote that, "[a] license has none of the elements of a contract, and does not confer an absolute right, but only a personal privilege to be exercised under existing restrictions, and such as may thereafter be reasonably imposed."[17] Connecticut's Supreme Court also noted that a statute providing for exchange of permanent teaching certificates for five-year certificates renewable upon completion of continuing education courses did not violate teachers' procedural or substantive due process rights. The constitutional protection of the right to contract was not impaired.[18]

A related issue is whether the state can require all currently certified teachers and administrators to take and pass a competency examination in order to retain their teaching credentials. As part of the Texas school reform package enacted in 1984, the legislature required the examination of reading and writing skills of all persons certified prior to 1986.[19] This law caused a great deal of consternation among the state's educators and resulted in several lawsuits against the state. The Texas Supreme Court pronounced that the testing requirement was constitutional.[20] The court held that because a teaching certificate is not a contract, "the constitutional prohibition against impairment of contracts is not violated when the legislature imposes new conditions for the retention of the certificate."[21] The court also found that state law provided adequate due process protection for teachers who failed to pass the competency test. The court rejected the contention that the law was fundamentally unfair by holding that the test had "a rational relationship to the legitimate state objective of maintaining competent teachers in the public schools."[22]

School districts may have the discretion to require specific types of certification as requirements for specific classes.[23] Teachers may be assigned to teach a course in which they are not certified, while in other states teachers can teach only in areas in which they are certified. A Louisiana appeals court held that teachers can only teach in the area in which they are certified.[24] On the other hand, a Missouri appeals court upheld the dismissal of a teacher who refused to teach a social studies class after she relinquished her certification in the field.[25] Her voluntary loss of certification in the field did not obviate her from her contractual obligation. In Illinois, a court held that in certain subjects the lack of a particular endorsement prohibited a school district from employing a teacher.[26]

A teacher in Oregon was dismissed by the local school board when it was reported that her certificate was no longer valid. The teacher received a renewal certificate from the state after her initial license had expired. She returned the renewal fee in the form of a personal check which was not honored by her bank. A letter was sent to her advising her of the problem with her check, but she did not pick up this letter. A subsequent letter was sent to her stating that the certificate was invalid because her check did not process. Ultimately, the teacher contested her dismissal in court, claiming that the board had not followed the procedures necessary to terminate her employment. Because she lacked a valid teacher's certificate, the court found that she was not "a teacher" within the meaning of the law."[27] This occurred even though her certificate had not been revoked; simply it had not been renewed.

A teacher in Alaska was required by state law to maintain current teacher certification. Her certificate expired during the school year and was not renewed until two months later. Neither she nor the school district was aware it had expired. It was determined in a hearing that she had been over paid and had lost her tenure. On appeal, the court applied a statutory "substantial noncompliance standard." It found that the teacher had substantially complied with the Alaska statutory requirement. Applying the standard, it found that the certification lapse was of short duration. "She easily and promptly obtained renewal. Those requirements which would provide apparent protection of the public, i.e., continuing education, background check, and notification of arrest were not in issue."[28]

A teacher in New Mexico was terminated and her contract was not renewed in spite of her tenure status after the school district superintendent informed the board that she lacked certification. The proceedings were complicated. It took two years before the court reversed the adverse employment action and ordered compensation. Problems were exposed about the State Department of Education concerning irregularities and delay. Among other things, the court found that the lack of certification was related to these difficulties.[29] A teacher in Maine had his application for recertification denied. The Commissioner of Education held that undue hardship related to personal problems including divorce and bankruptcy would excuse the untimely application. The school district appealed the commissioner's ruling, and the court upheld the decision stating the certification remained in effect until the application for recertification had been determined.[30]

A principal in Minnesota allowed his license to expire. The school district entered into a new contract with him. The following year the school board, without citing cause and without a hearing, voted to not renew his contract for the next school year. The principal filed suit against the district. The major concern of the school district officials was that the principal had not supplied them with proof of a valid license. The court analyzed what should be a common sense duty that in Minnesota is a legal obligation:

> A school district has a duty to ascertain the licensure status of its teachers.... While a lapsed license would not be grounds for immediate discharge of a...teacher, [a] two-year unlicensed status [is] a gross violation of a school district's obligation to ensure its teachers are

> qualified. The evident purpose of the filing requirement…is to provide the school district with the information necessary to meet the obligation…. We conclude that under these circumstances the school district…bore the burden of ensuring that the district's files were up to date.[31]

The court held that the district was precluded or estopped from asserting the licensure defect.[32]

The Revocation of a Teaching Certificate

With the right to certify teachers, a state has a collateral right to revoke certificates for just cause.[33] The suspension or revocation of a teaching certificate requires appropriate standards of due process as provided by law.[34] State statutes generally specify reasons for revocation of a certificate and provide the requisite due process procedures. A common reason in state statutes is the broad category of immorality. Several reasons that have been accepted by the courts as valid in revocation cases include: wearing religious dress while performing teaching duties in contravention of state law,[35] possession of 52 marijuana plants,[36] conviction of perjury and extortion,[37] falsifying attendance records,[38] conviction of eight counts of indecent assault upon several male children,[39] mail fraud,[40] fondling female students then attempting to persuade them to withdraw allegations,[41] and failure to obtain satisfactory evaluations.[42] Many states provide that a teacher's certificate may be suspended or canceled for abandoning an existing contract without good cause and without consent of the board of education.[43] Unprofessional conduct permitting termination must relate to the fitness to act in his or her professional capacity.[44]

All applicable standards of due process must be observed.[45] This step would include offering proper notice and a hearing. A Florida court held that the failure by the state's Education Practices Commission to give notice that a teacher was at risk of having his license permanently revoked, even if justified by the evidence, was an error, even if the revocation action was otherwise justified and supported by the evidence.[46] Due process was also an issue where a nontenured teacher was placed on the New York City school board's circular distributed to principals and superintendents indicating that he could not be employed in any public school because of discontinuance of his probationary appointment. The court held that he had a property interest in his teaching license, which was created and defined by state law. This was a legitimate claim of entitlement, not to a job, but rather "to the opportunity to seek employment in all thirty-one community school districts in the New York City school system."[47]

A teaching certificate in South Carolina was canceled by the state board on the basis of a testing company invalidating a test score. Since the board did not disclose any evidence substantiating cancellation of the test scores, the court noted that a hearing granted to the teacher did not comport with procedural due process.[48] However, a New Jersey court ruled that due process did not require the testing service to prove actual wrongdoing by a teacher suspected of cheating on a licensure examination. The court concluded that the test scores could be cancelled upon an adequate showing of a substantial question as to their validity.[49]

An important point is once a teacher is certified by the state, that teacher is considered to be competent. The state bears the burden of proof in all revocation cases. A Florida court has made it clear that all forms and procedures must substantially comply with state law. The court noted that the prosecutor in revocation cases must prove a strong case, the record must substantiate the findings, and the hearing board must review contents of investigative files and actually accept such files into evidence.[50]

A California appeals court discussed hearsay evidence stating, "[I]t is well settled that a board commits an abuse of discretion when it revokes a license to conduct a legitimate business without competent evidence establishing just cause of revocation, and that hearsay evidence alone is insufficient to support the revocation of such a license."[51] In contrast, an Oregon court rejected the position that hearsay evidence alone, even if inadmissible in a civil or criminal trial is not capable of being "substantial evidence."[52] A Montana court emphasized that, although the rules of evidence in an administrative proceeding are generally relaxed, they are not so relaxed that they disregard due process and fundamental rights.[53]

The effect of criminal prosecution is another matter. In Indiana, trial testimony describing rape provided sufficient evidence of immorality and misconduct for revocation, even though the conviction for rape was reversed.[54] An admission from a New York teacher of inappropriate sexual conduct was admissible in an administrative proceeding, although the admission had been obtained following a false representation by a private investigator hired by the school.[55] Evidence of substantive charges for the distribution of drugs that were contained in an erased or expunged criminal record was held to be admissible in Utah.[56]

Finally, a number of cases have involved the issue of authority to revoke licenses. In Rhode Island, the court ruled that the Board of Regents exceeded its authority when it canceled certificates prior to the stated expiration dates.[57] While in Illinois, the appellate court held that the state superintendent lacked authority to revoke a license after the Teacher Certification Board had voted not to revoke such license.[58] In Florida, the court stated that the Education Practices Commission was not authorized to permanently revoke a teaching certificate when the administrative complaint sought only revocation with a possibility of reinstatement.[59]

Recommendations for Practice

It is clear that any person seeking state teacher certification has the responsibility to see that all requirements are met and that the appropriate paperwork is completed. It also is that person's responsibility to ensure that the certificate is current and that appropriate action is taken to renew the certificate upon its expiration.

- School principals should monitor carefully the certification status of the staff to ensure that the certificates are current and in order.
- Principals may find that they are more involved in the initial assignment of teachers or in their reassignment because of fiscal problems or changing state curriculum regulations. Whether teachers may be assigned to teach outside of their area of certification is a question to be determined by the individual state. Principals should be aware that states differ in their interpretation of this issue.
- School principals may be called upon to provide documentation in a certificate revocation case. Such documentation must provide substantial evidence of the alleged wrongdoing.

References

[1] Bauer v. Bd. of Educ., 765 P.2d 1129 at 1135 (Kan. 1988).
[2] Sheridan Road Baptist Church v. Dep't. of Educ., 348 N.W.2d 263 (Mich. Ct. App. 1984).
[3] Trigg v. Sanders, 515 N.E.2d 1367 (Ill. App. Ct. 1987); *See also*, Howard v. Missouri State Bd. of Educ., 913 S.W.2d 887 (Mo. Ct. App. 1995).
[4] Clark Co. Sch. Dist. v. Harris, 913 P.2d 1268 (Nev. 1996); *See also*, State v. Rivinus, 328 N.W.2d 220 (N.D. 1982) and Picona v. Bd. of Educ., 671 A.2d 1035 (N.J. 1996).
[5] Fellow Baptist Church v. Benton, 620 F. Supp. 308 at 316 (S.D. Iowa 1985).
[6] *Id.*
[7] State v. Anderson, 427 N.W. 316 (N.D. 1988).

[8] Hosford v. School Comm. of Sandwich, 659 N.E.2d 1178. (Mass. 1996).

[9] Ambach v. Norwick, 441 U.S. 68 (1979).

[10] Hosack v. Smiley, 276 F. Supp. 876 (D. Colo. 1967), *aff'd*, 390 U.S. 744 (1968); *See also*, Gough v. State, 667 A.2d 1057 (N.J. Super. Ct. App. Div. 1995).

[11] Lombard v. Bd. of Educ., 645 F. Supp. 1574, 1577 (E.D.N.Y. 1986).

[12] Bradford Central Sch. Dist. v. Ambach, 451 N.Y.S.2d 654, 656 (N.Y. 1982).

[13] Lewis-Connelly v. Bd. of Educ. Of Deerfield Public Schools, Dist. 109, 660 N.E.2d 283 (Ill. App. Ct. 1996).

[14] Royster v. Cushman, 261 Cal. Rptr. 458 (Cal. Ct. App. 1989).

[15] Woods v. East St. Louis Sch. Dist., 498 N.E.2d 801 (Ill. App. Ct. 1986).

[16] Smith v. Andrews, 504 N.Y.S.2d 286 (N.Y. App. Div. 1986).

[17] Stone v. Fritts, 82 N.E. 792, 794 (Ind. 1987).

[18] Conn. Educ. Ass'n v. Tirozzi, 554 A.2d 1065 (Conn. 1989).

[19] Tex. Educ. Code Ann. § 13.047 (West 1986).

[20] State v. Project Principle, Inc., 724 S.W.2d 387 (Tex. 1987).

[21] *Id*. at 390.

[22] *Id*. at 391.

[23] Pleasant Valley Educ. Ass'n. v. Pleasant Valley Sch. Dist., 449 N.W.2d 894 (Iowa Ct. App. 1989).

[24] Tate v. Livingston Parish Sch. Bd., 444 So. 2d 219 (La. Ct. App. 1983).

[25] McLaughlin v. Bd. of Educ., 659 S.W.2d 249 (Mo. Ct. App. 1983).

[26] *Lewis-Connelly*, 660 N.E.2d 283 (Ill. App. Ct. 1996).

[27] Wagonblast v. Cook Cty. Sch. Dist., 707 P.2d 69 (Or. Ct. App. 1985).

[28] Nenana City Sch. Dist. v. Coghill, 898 P.2d 929 at 934 (Alaska 1995).

[29] Board of Educ. of Taos v. Municipal Sch., 712 P.2d 1384 (N.M. Ct. App. 1985).

[30] Sabattus School Comm. v. Department of Educ., 644 A.2d 1380 (Me. 1994).

[31] Lucio v. School Bd. of Indep. Sch. Dist., 574 N.W. 737 at 740 (Minn. Ct. App. 1998).

[32] *Id*.

[33] *See*, NEV. REV. STAT. § 391.330 (which states: The state board may suspend or revoke [a teacher's certification] for: 1) Immoral or unprofessional conduct. 2) Evident unfitness for service. 3) Physical or mental incapacity which renders the teacher, administrator or other licensed employee unfit for

service. 4) Conviction for a felony or crime involving moral turpitude. 5) Conviction of a sex offense...in which a pupil enrolled in a school of a county school district was the victim. 6) knowingly advocating the overthrow of the Federal Government or of the State of Nevada by force, violence or unlawful means. 7) Persistent defiance of or refusal to obey the regulations of the state board, the commission or the superintendent of public instruction, defining and governing the duties of teachers, administrators and other licensed employees.)

[34] Greenwald v. Community Sch. Bd. No. 27, 329 N.Y.S.2d 203 (N.Y. App. Div. 1972).

[35] Cooper v. Eugene Sch. Dist. No. 4J, 723 P.2d 298 (Or. 1986).

[36] Adams v. State Professional Practices Council, 406 So. 2d 1170 (Fla. Dist. Ct. App. 1981).

[37] Homer v. Commw. Dept. of Educ., 458 A.2d 1059 (Pa. Commw. Ct. 1983).

[38] Balentine v. Ark. State Bd. of Educ., 684 S.W.2d 246 (Ark. 1985).

[39] Couch v. Turlington, 465 So. 2d 557 (Fla. Dist. Ct. App. 1985).

[40] Startzel v. Commonwealth Dep't of Educ., 562 A.2d 1005 (Pa. Commw. Ct. 1989).

[41] Reguero v. Teacher Standards and Practices Comm., 789 P.2d 11 (Or. Ct. App. 1990).

[42] Eiche v. Louisiana Bd. of Elementary and Secondary Educ., 582 So. 2d 186 (La. 1991).

[43] *See, e.g.*, NEV. REV. STAT. § 391.350 ("Any teacher or other licensed employee employed by any board for a specified time who willfully refuses or fails to fulfill has employment...or to comply with the provisions of his contract may be found guilty of unprofessional conduct. The board shall not unreasonably withhold its consent.") *See also* NEV. REV. STAT. § 391.330 (which lists "unprofessional" conduct as a ground for suspension or revocation of a license to teach).

[44] Boss v. Fillmore County Sch. Dist. No. 441, 363 N.W.2d 126 (Neb. 1997).

[45] Brayton v. Monson Public Sch., 950 F. Supp. 33 (D. Mass. 1997).

[46] Longenecker v. Turlington, 464 So. 2d 557 (Fla. Dist. Ct. App. 1985).

[47] Lombard v. Bd. of Educ., 645 F. Supp 1574 (E.D.N.Y. 1986).

[48] Brown v. South Carolina St. Bd. of Educ., 391 S.E.2d 866 (S.C. 1990).

[49] Scott v. Educational Testing Service, 600 A.2d 500 at 504 (N.J. Sup. App. Ct. 1991).

[50] Fields v. Turlington, 481 So. 2d 960 (Fla. Dist. Ct. App. 1986).

[51] Carl S. v. Committee for Teacher Preparation and Licensing, 126 Cal. App. 3d 365 (Cal. Ct. App. 1991).

[52] *Supra* note 43.

[53] *In re* Thompson, 893 P.2d 301 (Mont. 1995).

[54] Ulrich v. State, 555 N.E.2d 172 (Ind. Ct. App. 1990).

[55] Stedronsky v. Sobol, 572 N.Y.S.2d 445 (N.Y. App. Div. 1991).

[56] Ambus v. Utah St. Bd. of Educ, 800 P.2d 811 (Utah 1990).

[57] Reback v. Rhode Island Bd. of Regents for Elementary and Secondary Educ., 560 A.2d 357 (R.I. 1989).

[58] Hunt v. Sanders, 554 N.E.2d 285 (Ill. App. Ct. 1990).

[59] Williams v. Turlington, 498 So. 2d 468 (Fla. Dist. Ct. App. 1986).

Schools And The Law

22

Devotional Activities in Public Schools

Martha M. McCarthy

Introduction

Religious—primarily Protestant—influences in American public education were common from colonial times until the mid-twentieth century. Then, in the early 1960s, these religious observances in public schools were significantly curtailed by two landmark Supreme Court decisions that barred school-sponsored daily prayer and Bible reading under the Establishment Clause.[1] The Court reasoned that voluntary participation of students in the religious activities was irrelevant; school sponsorship of such devotionals abridged the First Amendment. But these decisions did not settle all the controversial issues regarding devotional activities in public education. Indeed, they catapulted school prayer into the political realm, spawning almost four decades of litigation and legislative responses.[2]

From the mid-twentieth century through the 1980s, the Supreme Court generally supported church/state separation in education cases. Starting in 1971, for about two decades, the Court consistently applied the stringent three-part test articulated in *Lemon v. Kurtzman*, specifying that to withstand an Establishment Clause challenge, governmental action must have a secular purpose, must have a primary effect that neither advances nor impedes religion, and must avoid excessive governmental entanglement with religion.[3] Recently, however, the federal judiciary seems to be shifting away from its separationist stance and moving toward support for greater government accommodation of religion, especially in cases involving government aid to private schools.[4] Even in public school cases, courts seem more likely to uphold student-initiated religious expression than they were a quarter century ago.[5] Some justices favor using an "endorsement" standard under which challenged government action is invalidated if it entails endorsement or disapproval of religion.[6] Yet, instead of replacing *Lemon* with another standard, the current Supreme Court seems to favor flexibility in selecting criteria to assess Establishment Clause claims on a case-by-case basis. This chapter explores recent legal developments in connection with various types of religious activities in public education, highlighting changes in legal doctrine over the past decade.

Legal Issues

Silent Prayer

Students can pray silently in public schools; indeed, it is difficult to monitor when students are involved in such silent devotionals. Controversies have focused on state laws or school board policies that call for a period of silent meditation or prayer in public schools (usually one minute at the beginning of the day). In 1985 the Supreme Court rendered its first and only opinion to date on this issue, *Wallace v. Jaffree*, in which it invalidated a 1981 Alabama silent prayer law under the Establishment Clause.[7] The Court carefully reviewed the legislative history of the provision in ruling that the law was designed to advance religion. Because a 1978 Alabama statute already authorized a period of silent meditation in public schools, the Court concluded that the only logical reason for adding the phrase "or voluntary prayer" in the 1981 amendment was to encourage students to pray. The Court indicated, however, that laws calling for silent meditation or prayer in public schools *without* a legislative intent to impose prayer might withstand scrutiny under the Establishment Clause.

In a more recent case, the Eleventh Circuit found no Establishment Clause violation in a Georgia law requiring a moment for silent reflection in all public school classrooms at the beginning of the school day.[8] The court distinguished this law from the Alabama statute struck down in *Jaffree*, noting that the Georgia law was amended to remove its authorization of silent prayer, whereas the Alabama meditation law had been amended to add silent prayer. The amended Georgia law called for a period of up to one minute at the beginning of each school day for quiet reflection and specified that this was not to be a religious observance (although students, of course, can choose to pray silently). The law's provision stipulating that nothing in the statute would be construed to interfere with permissible voluntary student devotional activities was contested as authorizing voluntary prayer. The court reasoned that this provision authorized nothing and simply stated that other parts of the Georgia law should not be interpreted as prohibiting such voluntary prayer.

Voluntary Spoken Devotionals

Following the Supreme Court decisions barring daily devotionals in public schools in the 1960s, federal courts struck down several state laws or school board policies authorizing voluntary student prayers in public school assemblies and classrooms, reasoning that such actions represented the public school.[9] Even graduation devotionals, which some courts had upheld due to their transient, ceremonial nature, became vulnerable to Establishment Clause challenges starting in the mid-1980s.[10]

Then, in *Lee v. Weisman*, the Supreme Court in 1992 invalidated a Rhode Island school district's policy that permitted principals to invite clergy members to deliver invocations and benedictions at middle and high school graduation ceremonies.[11] The Court held that the policy had a coercive effect; students felt peer pressure to participate in the devotionals that were conducted at the school-sponsored graduation ceremony.[12] The Court was not persuaded that the voluntary nature of graduation exercises reduced the Establishment Clause violation, reasoning that students should not have to miss this important event because of their religious faith.

The Supreme Court's decision did not have the expected result of curtailing devotional activities in public school graduations. Instead, the negative reactions to this ruling motivated school authorities and students to identify creative ways to include prayers in graduation ceremonies.[13] Some school districts reinstated baccalaureate programs after a lapse of more than two decades, although these services now must be sponsored by churches or other groups not affiliated with the public schools. Such outside groups, nonetheless, can rent space from the school district to conduct the programs.[14] In a Wyoming case, the federal district court upheld a baccalaureate program that was not sponsored by the school, finding no impermissible school involvement, even though students rented the high school gym for the event, the school band performed, and graduation announcements included the baccalaureate program.[15]

Other school districts responded to *Weisman* by designating the graduation ceremony a forum for student expression, thus giving students latitude to include devotional messages in their graduation speeches. Under such circumstances, it is asserted that the student-led devotionals do not bear the stamp of school approval. In 1998, the Ninth Circuit upheld an Idaho school district's policy barring school authorities from censoring students' graduation speeches, leaving it up to the student speakers whether to deliver "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement."[16] The appellate panel distinguished this policy that gave students autonomy in their speeches from the policy authorizing clergy-led prayers during the graduation ceremony that was struck down in *Weisman*. Although the full appellate court later vacated the panel's decision and instructed the district court to dismiss the complaint for lack of standing and mootness, the challenged policy was left in place.

The Supreme Court has observed that there is a "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[17] However, the Court has not ruled that students' graduation speeches must be considered protected expression, as some conservative citizen groups contend.[18] Since several federal courts have upheld school authorities in censoring students' graduation speeches,[19] it appears that school authorities can designate the graduation ceremony a forum for student expression, but they are not obligated to do so. In the most recent ruling on this topic, the Ninth Circuit upheld a school district's review policy and its rejection of a student's sectarian graduation speech, because the speech would bear the imprint of the school district and, thus, constitute government endorsement of religion in violation of the Establishment Clause.[20]

Partly in response to the *Weisman* decision, in the 1990s there was renewed legislative activity pertaining to school prayer. A provision of the federal Goals 2000: Educate America Act (1994) prohibits state and local education agencies from using the federal funds authorized by the act to prevent voluntary prayer and meditation in public schools.[21] Also, in the 1990s several states (e. g., Alabama, Mississippi, Tennessee, Virginia) adopted laws authorizing student-initiated devotional activities at high school graduations and other extracurricular events, and the Alabama and Mississippi statutes went further, allowing student-initiated prayers in all public school activities.

The Fifth Circuit enjoined implementation of the Mississippi law except for the portion permitting student-led graduation prayers. The court reasoned that the remainder of the law violated the Establishment Clause because it swept too broadly by permitting prayers at virtually all school-related events.[22] In 1996, the Supreme Court declined to review the appellate court's decision.

Alabama's law, authorizing voluntary prayer from kindergarten through grade twelve, suffered a similar fate. In addition to invalidating the law on its face because it failed all three parts of the *Lemon* test, the federal district court reasoned that it coerced public school students to participate in religious activities and endorsed religion in violation of the Establishment Clause.[23]

The most controversial post-*Weisman* strategy to include prayers in graduations and other school events has been to allow students to vote whether to include student-delivered invocations and benedictions in the graduation ceremony. The Fifth Circuit upheld this practice, and the Supreme Court declined to review the decision in 1993.[24] Distinguishing this practice from devotionals directed by school authorities, the appeals court reasoned that allowing students to decide by election whether to have nonsectarian, nonproselytizing graduation devotionals removed the school's sponsorship of the religious expression.[25]

Subsequently, the Third and Ninth Circuit appellate courts reached an opposite conclusion.[26] They ruled that giving students control of devotional activities at a school-sponsored event does not eliminate the Establishment Clause violation. Recognizing that the Bill of Rights was intended to remove certain subjects from majority rule, these courts reasoned that school authorities cannot delegate to students decisions that the First Amendment forbids school districts from making in the first place. But the Supreme Court vacated the Ninth Circuit ruling and sent the case back to the federal district court with instructions to declare the case moot (presumably because the student plaintiff had graduated).

Although the Supreme Court has not directly addressed student-led graduation prayers, in 2000 it delivered an important decision, striking down a Texas school district's policy authorizing student elections to determine whether to have student-led devotionals before public school football games.[27] The Court majority in *Santa Fe Independent School District v. Doe* declared that student-led expression at a school event on school property and representing the student body under the supervision of school personnel could not be considered private speech.[28] Even though the ultimate choice of speakers and content was made by the students, the school authorized the student election in the first place, giving the impression that the devotionals represented the school. Thus, the Court majority concluded that the practice entailed both perceived and actual endorsement of religion and reasoned that the policy at issue had a sham secular purpose like the district's previous initiatives to promote Christian religious observances in school-related events.[29] While rejecting the argument that Establishment Clause concerns can be eliminated by delegating decisions to students, the majority emphasized that nothing in the Constitution prohibits public school students from voluntarily praying at school – only state sponsorship of such devotionals runs afoul of the Establishment Clause.[30]

But the *Santa Fe* ruling left unanswered questions about student-initiated devotionals in public schools, especially in graduation ceremonies. *Santa Fe* was rendered on the heels of two Eleventh Circuit decisions in which the appeals court took a strong stand in protecting student-initiated religious expression in public schools.[31] In *Adler v. Duval County*, the appellate court *en banc* upheld a Florida school district's policy that authorizes public school seniors to select classmates to give graduation messages and allows the speakers to choose the content, which can be sectarian.[32] In the second decision, the Eleventh Circuit in *Chandler v. James* lifted the part of an injunction that had prohibited students from publicly expressing religious views in most school settings in the DeKalb County, Alabama district.[33] The court declared that the Establishment Clause does not require and the Free Speech Clause does not permit suppression of student-initiated religious expression in public schools. The court emphasized that a school policy tolerating religion "does not improperly endorse it."[34]

Although the Supreme Court vacated the appellate decisions in both *Chandler* and *Adler* and remanded the cases for further consideration in light of *Santa Fe*, the Eleventh Circuit in *Chandler* reinstated its earlier judgment that the injunction could not prohibit genuinely student-initiated religious speech or regulate such expression differently from private secular expression.[35] The appeals court reiterated that the injunction had improperly equated all student religious speech in a public context at school with expression representing the public school and declared that public schools cannot censor private student religious expression. This appellate decision provides the strongest support to date for governmental accommodation toward religion in terms of student-initiated religious expression in public schools, and perhaps the Supreme Court will use this case to clarify the circumstances under which student religious speech in public schools is protected by the Free Speech Clause.

Most of the recent legal activity has focused on student-initiated devotionals, but other issues have also generated controversies. For example, the Seventh Circuit in 1992 upheld the daily recitation of the phrase "Under God" in the Pledge of Allegiance to the American flag. Rejecting an Establishment Clause challenge to an Illinois law requiring students to recite the Pledge, the appeals court reasoned that this phrase did not change this patriotic observance into a prayer.[36] The court concluded that in the Pledge, the "ceremonial deism...has lost through rote repetition any significant religious content."[37] Some school prayer advocates might try to extend this rationale to justify the daily recital of other religious materials used in a rote manner in public schools. But it seems unlikely that the judiciary will be persuaded to treat material with a religious purpose (e.g., student-initiated prayers over the school intercom) like a patriotic observance that has a single religious reference.

Several controversies in the 1990s have focused on students' decisions to use religious materials or topics in academic classes. The federal judiciary has been consistent in ruling that the public school instructional program is state-sponsored and subject to Establishment Clause restrictions. Students have not yet been successful in claiming a First Amendment right to express their religious views in class assignments and presentations. Courts have reasoned that student projects can be censored to ensure that the school is not perceived as endorsing religious content.[38] Nonetheless, students seem likely to continue to assert that religious views should be treated like other views in the classroom (as they are during noninstructional time). Indeed, the next wave of Establishment Clause litigation in public schools may involve the instructional program.

Given the federal courts' reluctance to condone devotional activities sponsored by the public school, numerous attempts have been made to amend the Federal Constitution to authorize some form of prayer in public education. Several amendments to sanction voluntary student devotionals in public schools have recently been introduced in Congress. If such an amendment should garner the necessary two-thirds majority in both houses and be ratified by the thirty-eight states required for adoption, its impact would reach far beyond prayer in public schools.

Religious Displays and Holiday Observances

The observance of religious holidays and the display of religious documents in public schools also remain contentious. In 1980, the Supreme Court declined to hear an appeal of an Establishment Clause case in which the Eighth Circuit allowed the prudent and objective observance of the Christmas holiday in public schools, even though songs such as "Silent Night" were sung and the nativity scene was displayed.[39] A week later, however, the divided Supreme Court struck down a Kentucky law calling for the posting of the Ten Commandments in public school classrooms.[40] The Court majority held that the purpose behind the Kentucky legislation was to advance a particular religious faith in violation of the Establishment Clause. The Court distinguished this display from the permissible use of religious literature in academic courses.

Following a decade of meager legal activity in this arena, several disputes in the 1990s have focused on religious displays and holiday observances. For example, the Sixth Circuit invalidated the display of a portrait of Jesus in a public secondary school,[41] and a New York federal district court enjoined the display of a religious painting in a high school auditorium.[42] But the New Jersey Federal District Court found that inclusion of religious holidays (e.g., Christmas and Hanukkah) on school district calendars satisfied the *Lemon* test because it was designed to broaden students' sensitivity toward diversity and knowledge of the role of religion in the development of civilization.[43] There has also been renewed interest in posting the Ten Commandments in public schools despite the 1980 Supreme Court precedent. A number of states and even Congress are considering legislation that would authorize posting the Ten Commandments with other historical documents in public buildings including schools, and several states have enacted these provisions.[44] Federal courts in Kentucky and Indiana have recently enjoined implementation of such state legislation.[45]

Several Supreme Court decisions outside the school domain since the mid-1980s have condoned the use of public funds or property for certain religious displays.[46] Notwithstanding these decisions, courts seem likely to continue to strike down the display of sectarian documents in public schools. However, the objective recognition of religious holidays will presumably withstand judicial scrutiny as long as particular faiths are not being promoted.

Student and Community Devotional Meetings During Noninstructional Time

The issue of student groups holding devotional meetings in public school facilities before or after school pits free speech, free exercise, and association rights against Establishment Clause restrictions. It was settled in 1981 that any infringement on college student groups' access to a forum created for student expression on state-supported campuses must be justified by a compelling governmental interest.[47] Yet, it was still assumed until 1984 that student religious groups could be barred from K-12 schools because of the Establishment Clause.[48] That year, Congress passed the Equal Access Act (EAA) stipulating that if a federally-assisted public secondary school provides a limited open forum for noncurriculum student groups to meet during noninstructional time, it cannot deny access to specific student groups because of the religious, political, or philosophical content of their meetings.[49] If the meetings have a religious orientation, school employees can attend only in a "nonparticipatory capacity" to maintain discipline.[50] Public high schools can comply with the EAA by not establishing a limited open forum for student expression and, thus, confining school access during noninstructional time to curriculum-related student groups. Even if a limited open forum is created, school authorities always can curtail meetings that would disrupt educational activities.

In 1990, the Supreme Court resolved some of the legal questions surrounding the EAA when it rejected an Establishment Clause challenge to the law in *Board of Education of the Westside Community Schools v. Mergens*.[51] The Court declared that a public secondary school allowing even one noncurriculum student group to meet is subject to the EAA and, thus, must grant school access to all nondisruptive student groups.[52] The majority concluded that secondary schools would be exempt from the Act's coverage only if all student groups are related to the curriculum in that their subject matter is currently or soon to be taught in the curriculum, they relate to the body of courses as a whole, or participation in the group is required as part of a course.[53] But, the court acknowledged the difficulties associated with determining whether some groups are curriculum related.[54]

In a subsequent case, the Ninth Circuit ruled that substantive rights afforded by the EAA prevailed over the state of Washington's constitutional guarantee of greater separation of church and state than required by the Establishment Clause. The court declared: "The EAA provides religious students a federal right. State law must therefore yield."[55] In 1995, the same court similarly ruled that the EAA prevailed over California's constitutional prohibition on governmental action entailing religious preferences, which was more stringent than the Establishment Clause. Accordingly, the court upheld the right of a student-initiated religious group to meet in the public school during lunch period, because this was not instructional time and other noncurriculum student groups were allowed to meet.[56] Also, the Second Circuit upheld the right of a student-initiated Bible Club to require some of its officers to be Christians. Rejecting the assertion that the leadership requirement conflicted with the school's nondiscrimination policy, the court reasoned that the EAA "protected the club's right to safeguard the spiritual content of its meetings by having dedicated Christians hold certain offices."[57]

The EAA does not apply to groups led by adults or to student groups that represent the public school. A Pennsylvania federal district court ruled that a gospel choir directed by the school secretary was not protected by the EAA because it was not a student-initiated club. The court reasoned that the choir would have to hold its meetings off school grounds unless it became student directed.[58]

The EAA also does not govern use of public school facilities by community religious groups during nonschool time, which basically involves a proprietary relationship. Public school authorities make school facilities available to community groups but are not involved in conducting or supervising the activities. In 1993, the Supreme Court relied on the First Amendment in holding that school districts cannot enforce policies governing facility use by community groups that entail viewpoint discrimination against sectarian groups. In short, the Free Speech Clause demands that religious views be allowed on topics that are addressed in the forum from secular perspectives.[59] Some courts, however, have distinguished religious meetings from regular religious worship, denying public school access for worship services.[60] But the line is not always clear between prohibited worship and the expression of protected religious viewpoints. For example, the Eighth Circuit held that a parent-led religious group targeting middle school students could not be denied use of the public school after school hours because scouts were allowed such access.[61] The Second Circuit reached an opposite conclusion, upholding a school district's denial of school access to a similar religious youth organization because the adult-led meetings would entail religious instruction and prayer.[62] The Supreme Court has agreed to review the latter case and perhaps soon will clarify the religious viewpoint/worship distinction under the First Amendment.

Distribution of Religious Literature

Most courts have prohibited religious groups from distributing materials to captive public school audiences. For example, several courts have struck down school board policies allowing the Gideon Society to visit schools and present Bibles to students who wish to accept them.[63] Departing from this trend, however, the Fourth Circuit in 1998 upheld the distribution of Bibles in a West Virginia school district.[64] The Court considered the Gideons to be *private* citizens, not representatives of the school, and thus upheld the district's policy designating a day that private groups could make religious or political materials available to students during noninstructional time.

Courts have been more consistent in allowing students, in contrast to religious groups, to distribute religious publications. Several courts have applied the "equal access" concept in concluding that the same legal principles govern students' distribution of religious and nonreligious literature.[65] In 1993, the Seventh Circuit recognized students' rights to distribute a religious newspaper in a public high school, equating religious with other private student expression. Yet, the court upheld the parts of the district's policy that restricted distribution of materials prepared by nonstudents to ten or fewer copies and confined distribution to specified times at a table near the school's entrance.[66] Even private expression can be subjected to reasonable restrictions on when, where, and how the expression is conveyed or distributed (i.e., time, place, and manner restrictions) to ensure that it does not interfere with the school's educational function.

A 1995 Supreme Court decision involving higher education may have implications for public schools. Holding that a public university could not withhold support from a student group desiring to use student activity funds to publish religious materials, the Court regarded religious content the same as other content in student-initiated publications.[67] This case is being relied on to assert Free Speech Clause protection of student religious expression in the K-12 context.[68]

Recommendations for Practice

Lower courts continue to render decisions all along the separation/accommodation continuum, but it appears that the Supreme Court is redefining the notion of governmental neutrality toward religion. The Court observed in 1995 that "the guarantee of neutrality is respected, not offended, where the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[69] Ralph Mawdsley has asserted that "the Establishment Clause has moved toward becoming what it never was in the past, namely a kind of antidiscrimination provision that prohibits government from treating religion differently from nonreligion."[70]

- Public schools already are experiencing some effects of this doctrine shift toward nondiscrimination neutrality, and there may be significant future implications. Observable religious activities in public schools will likely increase and reflect preferences of the community's dominant religious group. This, in turn, may stimulate additional Establishment Clause challenges from members of minority sects, asserting that they are unconstitutionally being subjected to the will of the religious majority. Although the exact nature of the controversies cannot be predicted, it seems assured that church/state disputes involving schools will continue to generate a steady stream of litigation in the twenty-first century.
- Notwithstanding the evolving nature of the law in this domain, litigation to date provides some guidance for school per-

sonnel as they make daily decisions regarding permissible and impermissible activities in public schools.

- School-sanctioned prayer during the public school day violates the Establishment Clause, regardless of whether participation is voluntary.
- Students can engage in silent prayer in public schools, but school personnel cannot promote such silent devotionals.
- Public schools cannot sponsor religious observances in school events including graduation exercises and extracurricular activities.
- Graduation ceremonies can be (but do not have to be) designated a forum for student expression, where content-based restrictions are not placed on students' speeches.
- Public schools cannot allow students to determine by election to have student-led prayers before athletic events.
- Public schools cannot permanently display sectarian documents, but they can recognize religious holidays in an objective manner.
- If a federally-assisted high school has created a limited forum for noncurriculum student groups to meet during noninstructional time, all student groups, including religious groups, must be allowed equal access.
- Expression rights protected by the federal Equal Access Act prevail over state mandates requiring a greater separation of church and state than demanded by the Establishment Clause.
- Public schools cannot discriminate against religious viewpoints in creating a forum for community groups to use school facilities when classes are not in session.

School authorities would be wise to bar religious organizations from distributing sectarian literature in public schools, whereas individual students have a free expression right to distribute such literature in conformance with reasonable school regulations.

References

[1] School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962). A few historical parts of this chapter build on M. MCCARTHY, N. CAMBRON-MCCABE, & S. THOMAS, PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS, chapter 2, 4th ed. (1998).

[2] *See* I. C. LUPU, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 234 (1994).

[3] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[4] *See* Mitchell v. Helms, 120 S. Ct. 2530 (2000) (upholding federal aid program under which computers and other instructional materials and equipment are provided for students in private schools); Agostini v. Felton, 521 U.S. 203 (1997) (lifting injunction and rejecting Establishment Clause challenge to the use of pubic school personnel to provide remedial services in parochial schools); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) (holding that the Establishment Clause does not require a public university to deny student activity funds to student groups that will use the funds to distribute sectarian publications); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (rejecting Establishment Clause challenge to the use of public funds for sign language interpreters to assist hearing deficient children in parochial schools).

[5] *See* Chandler v. James, 180 F.3d 1254 (11th Cir. 1999), *vacated and remanded* (for reconsideration in light of Santa Fe v. Doe), 120 S. Ct. 2714 (2000), *on remand sub nom.* Chandler v. Siegelman, 2000 U.S. App. LEXIS 26016 (11th Cir. 2000) (lifting part of an injunction that had prohibited students from expressing private religious views in public schools); Adler v. Duval County Sch. Bd., 206 F.3d 1070 (11th Cir. 2000) (upholding a school district's policy authorizing public school seniors to select classmates to give graduation messages of their choosing), *vacated and remanded (for reconsideration in light of Santa Fe v. Doe)*, 2000 U.S. LEXIS 4872 (2000).

[6] *See* Lee v. Weisman, 505 U.S. 577, 609 (1992) (Souter, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

[7] 472 U.S. 38 (1985). *See also*, May v. Cooperman, 780 F.2d 240 (3d Cir. 1985), *appeal dismissed sub nom.* Karcher v. May, 484 U.S. 72 (1987).

[8] Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464 (11th Cir. 1997).

[9] *See, e. g.*, Jaffree v. Board of Sch. Comm'rs of Mobile County, 705 F.2d 1526 (11th Cir. 1983), *cert. denied in part*, 466 U.S. 926 (1984) (teacher-initiated devotional activities); Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *aff'd mem. in part*, 466 U.S. 924 (1984) (Alabama voluntary prayer law); Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982) (Louisiana voluntary prayer law); Collins v. Chandler Unified Sch. Dist., 644 F.2d 759 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981) (student-led prayers in school assemblies).

[10] *See, e. g.*, Stein v. Plainwell Community Schs., 822 F.2d 1406 (6th Cir. 1987); Lundberg v. West Monona Community Sch. Dist., 731 F. Supp. 331 (N.D. Iowa 1989); Sands v. Morongo Unified Sch. Dist., 809 P.2d 809 (Cal. 1991), *cert. denied*, 505 U.S. 1218 (1992).

[11] Lee v. Weisman, 505 U.S. 577 (1992).

[12] Although the majority opinion applied a coercion test, four of the justices who joined the majority opinion (Blackmun, O'Connor, Souter, and Stevens, J. J.) also signed concurring opinions in which they asserted that coercion would be sufficient to abridge the Establishment Clause, but it is not a necessary prerequisite. *See* Weisman, 505 U.S. at 599 (Blackmun, J., concurring); 505 U.S. at 609 (Souter, J., concurring).

[13] In a poll conducted by Phi Delta Kappa, Int., superintendents from 71 percent of the national sample of school districts reported that some type of prayer was included in their high school graduation exercises in 1993. L. BARBER, *Prayer at Public School Graduation: A Survey,* 75 PHI DELTA KAPPAN 125 (1993).

[14] *See, e. g.*, Verbena United Methodist Church v. Chilton County Bd. of Educ., 765 F. Supp. 704 (M.D. Ala. 1991) (holding that a school board must take all measures reasonably necessary to disassociate itself from a baccalaureate service sponsored by religious organizations and conducted in space rented from the school district).

[15] Shumway v. Albany County Sch. Dist. No. One, 826 F. Supp. 1320 (D. Wyo. 1993).

[16] Doe v. Madison Sch. Dist. No 321, 147 F.3d 832 (9th Cir. 1998), *vacated en banc*, 177 F.3d 789 (9th Cir. 1999).

[17] Board of Educ. of Westside Community Schs. v. Mergens, 496 U.S. 226, 250 (1990).

[18] *See, e. g.*, American Center for Law and Justice, EDUCATION LAW AND STUDENTS' RIGHTS UNDER THE FIRST AMENDMENT (Virginia Beach, VA: Liberty, Life, and Family Publications, 1994).

[19] *See* Brody v. Spang, 957 F.2d 1108 (3d Cir. 1992) (concluding that the graduation ceremony is not a forum for student expression unless designated as such by school authorities); Guidry v. Broussard, 897 F.2d 181 (5th Cir. 1990) (endorsing the school's rejection of a student's valedictory speech with sectarian material, because such a speech at a school-sponsored event would have the primary effect of advancing religion).

[20] Cole v. Oroville Union High Sch. Dist., 2000 U.S. App. LEXIS 24496 (9th Cir. 2000).

[21] Goals 2000: Educate America Act, 20 U. S. C. § 6061 (2000).

[22] Ingebretsen v. Jackson Pub. Sch. Dist., 864 F. Supp. 1473 (S.D. Miss. 1994), *aff'd*, 88 F.3d 274 (5th Cir. 1996), *cert. denied sub nom.* Moore v. Ingebretsen, 519 U.S. 965 (1996).

[23] Chandler v. James, 958 F. Supp. 1550 (M.D. Ala. 1997). *See also* Committee for Voluntary Prayer v. Wimberly, 704 A.2d 1199 (D.C. 1997) (upholding preelection review of voluntary school prayer proposal and finding the initiative improper for the ballot because if violates the Establishment Clause).

[24] Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991), *vacated and remanded*, 505 U.S. 1215 (1992), *on remand*, 977 F.2d 963 (5th Cir. 1992). *cert. denied*, 508 U.S. 967 (1993).

[25] *See also*, Goluba v. School Dist. of Ripon, 45 F.3d 1035 (7th Cir. 1995) (holding that student-initiated recitation of the Lord's Prayer five minutes before the graduation ceremony began did not violate an injunction prohibiting school personnel from authorizing, conducting, sponsoring, or intentionally permitting prayers during the ceremony); Tanford v. Brand, 104 F.3d 982 (7th Cir. 1997), *cert. denied*, 522 U.S. 814 (1997) (rejecting challenge to invocation and benediction at university commencement, reasoning that there is no coercion with adult students who have the maturity to choose among competing beliefs); Bauchman v. West High Sch., 900 F. Supp. 254 (D. Utah 1995), *aff'd in part, dismissed in part, remanded in part*, 132 F.3d 542 (l0th Cir. 1997), *cert. denied*, 524 U.S. 953 (1998) (upholding a school choir's use of two religious songs during the graduation ceremony as the songs promoted friendship rather than religion).

[26] ACLU of N. J. v. Blackhorse Pike Regional Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994), *vacated*, 515 U.S. 1155 (1995).

[27] 168 F.3d 806 (5th Cir. 1999), *aff'd*, 120 S. Ct. 2266 (2000). Courts consistently have struck down prayers led or encouraged by school personnel during athletic contests and other extracurricular events. *See* Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1995) (prohibiting public school employees from leading or encouraging prayers during school-related activities, but upholding the school choir's use of a religious theme song); Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090 (1989) (finding invocations prior to public high school athletic contests in violation of the Establishment Clause); Steele v. Van Buren Pub. Sch. Dist., 845 F.2d 1492 (8th Cir. 1988) (concluding that prayers led by the band teacher at rehearsals and perform-

ances were condoned by the school board in violation of clearly established law).

[28] Santa Fe Independent Sch. Dist. v. Doe,120 S. Ct. at 2279.

[29] *Id.* at 2278-2279. The Court emphasized that it is necessary to carefully review the history and context of the challenged action in determining its facial validity. *Id.* at 2283.

[30] *Id.* at 2277- 2281.

[31] *See* Chandler v. James, 180 F.3d 1254 (11th Cir. 1999), *vacated and remanded* (for reconsideration in light of Santa Fe v. Doe), 120 S. Ct. 2714 (2000), *on remand sub nom.* Chandler v. Siegelman, 2000 U.S. App. LEXIS 26016 (11th Cir. 2000); Adler v. Duval County Sch. Bd., 206 F.3d 1070 (11th Cir. 2000), *vacated and remanded* (for reconsideration in light of Santa Fe v. Doe), 2000 U.S. LEXIS 4872 (2000).

[32] Adler v. Duval County, 206 F.3d 1070 (11th Cir. 2000).

[33] *Chandler*, 180 F.3d 1254 (11th Cir. 1999).

[34] *Id.* at 1261.

[35] Chandler v. Siegelman, 2000 U.S. App. LEXIS 26016 (2000).

[36] Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993).

[37] *Id.*, 980 F.2d 437 at 446 (citing Lynch v. Donnelly, 465 U.S. 668, 716 (1984)).

[38] *See, e. g.*, Settle v. Dickson County Sch. Bd., 53 F.3d 152 (6th Cir. 1995), *cert. denied*, 516 U.S. 989 (1995) (upholding a teacher who gave a student a zero on a report because the student had cleared a different topic and then wrote the report on the life of Jesus Christ); DeNooyer v. Livonia Pub. Schs., 12 F.3d 211 (6th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994) (upholding a school district's denial of an elementary school student's request to show a videotape of herself singing a proselytizing religious song as part of a class presentation); Duran v. Nitsche, 780 F. Supp. 1048 (E.D. Pa. 1991) (upholding school personnel in prohibiting a student in a class for the gifted from distributing a religious survey to classmates), *appeal dismissed and vacated*, 972 F.2d 1331 (3d Cir. 1992); C. H. v. Oliva, 166 F.3d 1204 (3d Cir. 1998) (rejecting claim that the school district abridged First Amendment rights by preventing a student from reading a Bible story to classmates).

[39] Florey v. Sioux Falls Sch. Dist. 49-5, 619 F.2d 1311 (8th Cir. 1980), *cert. denied*, 449 U.S. 987 (1980).

[40] Stone v. Graham, 449 U.S. 39 (1980). The Court rejected the state judiciary's conclusion that the constitutional impairment was neutralized because the copies were purchased with pri-

vate donations and carried a disclaimer emphasizing the secular application of the Ten Commandments. *Id.* at 41. *See also,* Nartowicz v. Clayton County Sch. Dist., 736 F.2d 646 (11th Cir. 1984) (barring the use of public school bulletin boards and public address systems to announce church-sponsored activities).

[41] Washegesic v. Bloomingdale Pub. Schs., 33 F.3d 679 (6th Cir. 1994), *cert. denied*, 514 U.S. 1095 (1995).

[42] Joki v. Board of Educ. of Schuylerville Cent. Sch. Dist., 745 F. Supp. 823 (N.D.N.Y. 1990).

[43] Clever v. Cherry Hill Township Bd. of Educ., 838 F. Supp. 929 (D.N.J. 1993). *See* R. MAWDSLEY, *Clever v. Cherry Hill Township Board of Education: Recognition of Religious Diversity in Public Schools*, 90 EDUC. L. REP. 533 (1994).

[44] M. WALSH, *Commandments Debate Moves to Statehouse,* EDUCATION WEEK, February 16, 2000, pp. 18, 21.

[45] *See* Doe v. Harlan County Sch. Dist., 96 F. Supp. 2d 667 (E.D. Ky. 2000); Indiana Civil Liberties Union v. O'Bannon, 110 F. Supp.2d 842 (S.D. Ind. 2000).

[46] *See, e. g.*, Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (upholding the right of the Ku Klux Klan to place an unattended cross on the Ohio capitol square during the Christmas season); County of Allegheny v. ACLU, 492 U.S. 573 (1989) (upholding the public display of a Menorah along with a Christmas tree and a sign declaring the city's salute to liberty, but striking down a display of the Nativity Scene with a banner proclaiming "Gloria in Excelsis Deo" in the county courthouse); Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding the use of municipal funds to erect a Christmas display with the nativity scene in a private park).

[47] Widmar v. Vincent, 454 U.S. 263 (1981).

[48] Bender v. Williamsport Area Sch. Dist., 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986); Bell v. Little Axe Indep. Sch. Dist. No. 70, 766 F.2d 1391 (10th Cir. 1985); Nartowicz v. Clayton County Sch. Dist., 736 F.2d 646 (11th Cir. 1984); Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist., 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); Brandon v. Board of Educ. of Guilderland Cent. Sch. Dist., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). These courts found significant differences between public schools and residential college campuses in that younger students are more impressionable, schooling through part of high school is compulsory, faculty supervision is required for student groups in public schools, and

public school students have access to their homes for religious meetings before or after school.

[49] 20 U. S. C. § 4071 (2000).

[50] *Id*. at § 4071 (c)(3).

[51] Board of Educ. of the Westside Community Schs. v. Mergens, 496 U.S. 226 (1990).

[52] *Id*. at 235.

[53] *Id*. at 239.

[54] In 1996 the Salt Lake City School Board ended its policy of providing a limited forum for noncurriculum student groups in the district's high schools during noninstructional time. This action followed the Gay-Straight Alliance's request for school access. *See* East High Gay-Straight Alliance v. Board of Educ. of Salt Lake City Sch. Dist., 30 F. Supp.2d 1356 (D. Utah 1998), supplemental order, 81 F. Supp.2d 1199 (D. Utah 1999) (finding all groups allowed to meet in the school to be curriculum related and rejecting a Free Speech Clause challenge to the elimination of the limited forum). *But see*, Colin v. Orange Unified Sch. Dist., 83 F. Supp.2d 1135 (C.D. Cal. 2000) (finding the denial of school access during noninstructional time to the Gay-Straight Alliance violated the EAA by discriminating against the Alliance because of the nature of the expression at its meetings). Subsequently, the California school district agreed to recognize the Alliance as a student club, and the Salt Lake City School Board also removed its ban on noncurriculum groups using school facilities. *See* M. WALSH, *Gay-Straight Student Clubs Are Recognized*, EDUCATION WEEK, September 13, 2000, p. 16.

[55] Garnett v. Renton Sch. Dist. No. 403, 987 F.2d 641, 646 (9th Cir. 1993), *cert. denied*, 510 U.S. 819 (1993).

[56] Ceniceros v. Board of Trustees of San Diego Unified Sch. Dist., 66 F.3d 1535 (9th Cir. 1995).

[57] Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839 (2d Cir. 1996), *cert. denied*, 519 U.S. 1040 (1996).

[58] Sease v. School Dist. of Philadelphia, 811 F. Supp. 183 (E.D. Pa. 1993).

[59] Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

[60] *See, e. g.*, Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207 (2d Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

[61] Good News/Good Sports Club v. School Dist. of Ladue, 28 F.3d 1501 (8th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995).

[62] Good News Club v. Milford Central Sch. Dist., 202 F.3d 502 (2d Cir. 2000), *cert. granted*, 121 S. Ct. 296 (2000).

[63] *See, e. g.*, Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1995); Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160 (7th Cir. 1993), *cert. denied*, 508 U.S. 911 (1993).

[64] Peck v. Upshur County Bd. of Educ., 155 F.3d 274 (4th Cir. 1998). *See also*, Schanou v. Lancaster County Sch. Dist. No. 160, 863 F. Supp. 1048 (D. Neb. 1994), *vacated*, 62 F.3d 1040 (8th Cir. 1995) (instructing lower court, which had upheld board policy allowing Bible distribution outside school, to dismiss challenge to the policy and to the single incident of Bible distribution in the public school hallway in violation of the policy); Bacon v. Bradley-Bourbonnais High Sch. Dist. No. 307, 707 F. Supp. 1005 (C.D. Ill. 1989) (upholding distribution of Gideon Bibles on the school-owned sidewalk in front of a high school, because it was considered a public forum for use by the general public).

[65] *See, e. g.*, Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280 (E.D. Penn. 1991); Rivera v. East Otero Sch. Dist. R-1, 721 F. Supp. 1189 (D. Colo. 1989); Thompson v. Waynesboro Area Sch. Dist., 673 F. Supp. 1379 (M.D. Pa. 1987).

[66] Hedges v. Wauconda Community Unit Sch. Dist., *amended and vacated*, 807 F. Supp. 444 (N.D. Ill. 1992), *aff'd in part, vacated in part and remanded*, 9 F.3d 1295 (7th Cir. 1993). *See also*, Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530 (7th Cir. 1996) (applying same rules to the distribution of religious and nonreligious student literature that is not sponsored by the school). *But see*, Perumal v. Saddleback Valley Unified Sch. Dist., 243 Cal. Rptr. 545 (Ct. App. 1988), *cert. denied*, 488 U.S. 933 (1988) (holding that a student religious club was not entitled to distribute its materials on the high school campus or advertise in the school's yearbook because the school had not created a limited forum for noncurriculum student groups, and even if it had, the Establishment Clause would prohibit these activities).

[67] Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819 (1995).

[68] *See, e.g.*, Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839 (2d Cir. 1996).

[69] Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 839 (1995).

[70] R. MAWSDLEY, *Invalidating The Religious Freedom Restoration Act: Implications for Religious Liberty,* 123 EDUC. L. REP. 431, 445 (1998). Mawdsley asserts that the status of the Free Exer-

cise Clause as well as the Establishment Clause has been weakened by recent judicial action.

23

Religion in the School Curriculum

Frank R. Kemerer

Introduction

The role of religion in the public school curriculum is receiving more attention in the education literature as greater efforts are made to recognize both the important role of religion in American history and the diversity of religious beliefs among Americans. For example, a recent book by Nord and Haynes asserts that while the school cannot proselytize, it should not be a "religion-free" zone either.[1] In part, this development reflects a backlash against the strong separationist policies of the past and, in part, the desire to appease the interests of religious groups. At the same time, the United States Supreme Court has not changed its view that the Establishment Clause of the First Amendment, together with provisions of the Fourteenth Amendment, prevents schools from advancing any particular religion or religion in general. The Establishment Clause states that "Congress shall make no law respecting an establishment of religion" and applies to public school districts as political subdivisions of the state under the terms of the Fourteenth Amendment. In some states, the anti-establishment of religion clause in the state constitution even more strictly separates the state from religion.[2] Administrators thus need to monitor developments in both federal and state law pertaining to their school district. The effort continues to locate the proper balance between inclusion of religion in the curriculum and unconstitutional promotion and proselytizing.

The Supreme Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private

> beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.[3]

Legal Issues

Teaching About Religion

Clearly, public schools cannot teach religion. Doing so would breach the so-called *Lemon* test that federal courts use to determine whether government has violated the Establishment Clause. The *Lemon* test is named after a 1971 United States Supreme Court decision, *Lemon v. Kurtzman.*[4] While the United States Supreme Court has shown some hesitancy in recent cases to employ the *Lemon* test and several justices have urged the modification or abandonment altogether, the test continues to be used. The test requires that governmental activity satisfy three criteria: there must be a secular purpose, there must be primary effect that neither advances nor inhibits religion, and there must not be excessive governmental entanglement with religion.[5] A violation of any one will invalidate the activity. The Supreme Court also has advised that breaches of the Establishment Clause can occur when government through its involvement with religion conveys a message of religious endorsement and when there is a coercive effect on objecting students to participate in government-directed religious activities.[6] Clearly, a school's teaching religion would violate all of these criteria.

At the same time, if religion is neglected in the curriculum, students are limited in their ability to make sense of the world. As the Court noted in an early school prayer decision, "one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities."[7] The key is to teach about religion in a neutral manner.

Teaching about religion requires a curriculum that does not favor or denigrate any particular religion or religion in general and teachers who remain neutral. Courses in comparative religion are most likely to fall into the permissible zone. Courses that focus exclusively on the Bible are more vulnerable to constitutional infirmities because the Bible is a religious tract and is usually taught from a distinctly religious perspective. Thus, it is not surprising that most Bible study courses do not pass constitutional muster.[8] To illustrate the problem of separating religion from history in using the Bible as a text, consider that the account of the resurrection of Jesus Christ as told in the New Testament forms the central core of the Christian religious faith. As a Florida federal judge put it in a 1998 decision, it is "difficult to conceive how the resurrection might be taught as secular literature or secular history."[9] Until this and other distinctly religious components of a Bible history course focusing on the New Testament were modified or deleted, the court held that teaching such a course to high school students would be unconstitutional.

A particularly instructive decision regarding the use of the Bible as an instructional source is *Herdahl v. Pontotoc County School District*, a 1996 federal district court decision in Mississippi.[10] The case involved a challenge to school prayer and religious instruction practices. For 50 years, a Bible committee composed of members of local Protestant churches had sponsored Bible study classes in the district. The committee hired the teachers, and the district allowed them to teach on school district premises. Only instructors who expressed a fundamentalist Christian perspective were selected. While the district did not pay the teachers, it did assert supervisory authority over them and provided funds for books and supplies. After the Mississippi State Department of Education denied accreditation for the class, the committee developed a new curriculum entitled "A Biblical History of the Middle East." However, course content remained the same. The court found the course violated the *Lemon* test and also constituted impermissible governmental endorsement of religion and unconstitutionally coerced students into participating in the program. The judge wrote,

> The Bible study program is part of a concerted effort by the religious sponsors of the class, fully condoned by the District, to inculcate students at North Pontotoc into the beliefs and moral code of fundamentalist Christianity—an admirable goal perhaps for some private citizens or for a private religious school, but a forbidden one for the government.[11]

What is instructive about the *Herdahl* decision is the guidelines the judge listed for teaching Bible history in a constitutionally acceptable manner. These include teaching the course objectively as part of a secular program of education; not using the Bible as the only source of historical fact or as if the Bible were actual literal history; requiring other readings from non-Biblical sources; not teaching religious doctrine or a sectarian interpretation of the Bible; and not accepting teachers for the class based in whole or part on a religious test, profession of faith, or criteria involving particular beliefs about the Bible.

Because teachers are role models, it is important that they not give the appearance of endorsing religion in the classroom. A case in point is a special education teacher in New York who began using religious themes and materials in his classes following his conversion to Christianity. The director of special education directed him to cease doing so, pointing out that public schools must remain neutral in matters of religion. The teacher refused to follow the directive, asserting it would be detrimental to his students and violate "his conscience before God." The teacher was suspended for six months. Upon his return, he filed a lawsuit contending that his rights of free speech and free exercise of religion were violated and that the directives he received were unconstitutionally vague. The Second Circuit rejected the contentions in a 1999 decision.

> Though school boards, like all instrumentalities of government, must observe the basic free exercise rights of its employees, the scope of the employees' rights must sometimes yield to the legitimate interest of the governmental employer in avoiding litigation by those contending that an employee's desire to exercise his freedom of religion has propelled his employer into an Establishment Clause violation.[12]

The Tenth Circuit ruled similarly a few years earlier regarding a Denver, Colorado, teacher whom the principal directed to remove two books on Christianity from his personal library in the classroom and not to display a Bible on his desk nor read from it during the silent reading period. The teacher also had displayed a religious poster in the classroom. The trial court found that the teacher's motive was to endorse religion by his actions and backed the principal. The Tenth Circuit affirmed the decision in a two-to-one decision, noting that the school's principal was acting to assure the school's neutrality regarding religion in light of the impressionable age of the students.[13]

Sometimes school districts are sued over what parents regard as the teaching of secular humanism or pagan beliefs. The secular humanism cases have not been successful, in large part because few courts consider secular humanism to be a religion within the definition of the Establishment Clause. As the Ninth Circuit has observed, "Both the dictionary definition of religion and the clear weight of the case law are to the contrary."[14] While the Eleventh Circuit refused to rule on the issue in 1987 in reversing a trial judge's order removing forty-four of forty-five textbooks from use in the schools of Mobile County, Alabama, the court concluded that even if secular humanism were considered a religion, the school district had not breached the Establishment Clause.[15] This was so because something more is necessary than that curricular content coincide with tenets of secular humanism. "In order for government conduct to constitute an impermissible advancement of religion, the government action must amount to an endorsement of religion." Here, the court observed, the message conveyed by the textbooks was neutrality.

The pagan belief cases also have not been generally successful. For example, in a case involving a challenge to the use of an elementary school supplemental reading series called "Impressions," the Seventh Circuit had trouble figuring out what religion was being promoted. "Impressions" consists of some ten thousand literary selections and suggested classroom activities. Several parents objected to thirty-two readings that they contended promoted the practice of witchcraft, a religion called "Wicca." Most of the challenged selections ask children to discuss witches or sorcerers. A few invite students to role-play these characters. The court wrote,

> We have before us a party claiming that the use of a collection of stories, a very few of which resonate with beliefs held by some people, somewhere, of some religion, has established this religion in a public school. This allegation of some amorphous religion becomes so much speculation as to what some people might think.[16]

The court rejected the parents' challenge, noting that the government has a compelling purpose in using the series for the purpose of building students' reading skills and of developing their senses of imagination and creativity. A Florida state court of appeals later drew from the reasoning in this decision to reject a challenge to the observance of Halloween in an elementary school as an impermissible advancement of religion.[17] The court concluded that Halloween decorations portraying witches, cauldrons, and brooms make Halloween a fun day and serve the educational purpose of enriching their educational background and cultural awareness. Both the Florida Supreme Court and the United States Supreme Court refused to hear the case.

However, in 1999, a federal district court judge in New York drew the line at having elementary students in the Westchester County school district construct a Hindu god's likeness, make "worry dolls" intended to dispel everyday anxieties when left under a child's pillow, and give New Age prayer recitals at a high school Earth Day celebration.[18] These activities, the judge concluded, crossed over into religious teaching, thus breaching the Establishment Clause. At the same time, the judge rejected parents' complaints about yoga lessons, cemetery visits, and the use of a magic card game. At this writing, the decision has been appealed.

Teaching Evolution and Creation-Science

After a number of lower court decisions involving creation-science, the United States Supreme Court settled the matter with its 1987 decision in *Edwards v. Aguillard.*[19] The case concerned a challenge to a statute passed by the Louisiana Legislature requiring Louisiana schools to give equal treatment to creation-science. The statute, entitled the "Balanced Treatment for Creation-Science and Evolution-Science Act," defined creation science as scientific evidence for the theory that life appeared on earth relatively recently (in geological terms) and has changed little since its appearance. The law required that if either evolution or creation-science is taught, the other theory must be taught. The law also provided that each school board prepare curriculum guides and make available teaching aids and resource materials on creation science. Finally, the law prohibited school boards from discriminating against someone who teaches creation-science. By a strong seven-to-two majority, the Court found the act's primary purpose was to restructure the science curriculum to conform to a particular religious viewpoint and, thus, was unconstitutional. The Court rejected the state's argument that the statute's purpose was to promote academic freedom. Teachers had ample freedom before the law was enacted to add other scientific theories about the origin of humans to the curriculum. By limiting them to only two views and requiring that both be taught, the Louisiana statute resulted in precisely the opposite of academic freedom.

It is important to note that the school is not left with the option of teaching only evolution. Justice Brennan noted, in a key sentence, "teaching a variety of scientific theories about the origins of humankind to school children might be validly done with the clear secular intent of enhancing the effectiveness of science instruction."[20] Thus, it would appear to be legal under the *Edwards* ruling for a school district to include in its curriculum the scientific evidence associated with creation-science, as long as the scientific evidence associated with a variety of other theories also is included and the material is presented objectively. The religious underpinnings of any of the theories should not be stressed.

Can a school district add a disclaimer before teaching evolution to the effect that lessons about evolution are "not intended to influence or dissuade the Biblical version of creation or any other concept?" According to a 1999 ruling of the Fifth Circuit, the answer is no. The appellate court found the disclaimer did not encourage critical thinking, contrary to the school board's assertion, but was instead "a sham." "We conclude that the primary effect of the disclaimer is to protect and maintain a particular religious viewpoint, namely belief in the Biblical versions of creation."[21]

Occasionally, teachers will attempt to supplement the science curriculum by inserting their religious views. The courts are not supportive. For example, in a 1994 ruling, the Ninth Circuit ruled against a California science teacher who argued a First Amendment right to teach his students creationism as expounded in the Book of Genesis.[22] School officials had directed the teacher to confine his teaching to evolution, as required by the approved curriculum, and to cease attempting to influence students to his personal religious beliefs. The appeals court noted that evolution is not a religion and, thus, rejected the teacher's claim that teaching it violated the Establishment Clause. The court also upheld the school district's directive prohibiting the teacher from having any religious discussions with students during the school day, given his penchant for proselytizing. The Seventh Circuit ruled similarly in a case involving a social studies teacher who claimed the right to introduce creation-science into his classes in order to balance views in the textbook that he disagreed with, e.g., the world is over four billion years old.[23] The superintendent had directed the teacher to avoid advocating a Christian viewpoint, though he could discuss objectively the historical relationship between church and state when appropriate to the curriculum.

Curricular Exemptions

Exemptions are a matter of state law, local school board policy, and constitutional law. Here we will deal with exemptions based on the Free Exercise Clause of the First Amendment. The Free Exercise Clause follows the Establishment Clause in the First Amendment and prohibits Congress from enacting any law prohibiting the free exercise of religion. Like the Establishment Clause, it applies to school districts as political subdivisions of the state under the Fourteenth Amendment. We will have occasion to consider the Free Exercise Clause again in the section of the chapter dealing with religious classroom presentations and papers.

Two United States Supreme Court rulings involving religious-based exemptions are worthy of note. The first is *West Virginia State Board of Education v. Barnette*, a 1943 ruling involving objections of Jehovah's Witnesses to having their children salute the flag in a public school classroom. The Supreme Court held the requirement unconstitutional, not just for Jehovah's Witnesses but for all students, because such a compulsion infringes First Amendment liberty rights.[24] While there is much language in the decision about the rights of parents and students to be free from government-fostered orthodoxy, *Barnette* has been confined to the flag salute context and by no means has been read to allow students and their parents a general First Amendment right to seek exemptions from compulsory schooling or from curriculum requirements.

The second ruling is *Wisconsin v. Yoder*, a 1972 ruling that involved the religious objections of the Old Order Amish to compulsory schooling beyond the eighth grade.[25] The Court ruled for the Amish in this instance but cautioned that it would be extremely reluctant to extend the ruling to other religions. To date, no other religion has been given as broad an exemption as the Old Order Amish.

Other than these two high court rulings, the leading case regarding religious exemptions in the context of public schooling is *Mozert v. Hawkins County Board of Education*, a 1987 decision of the Sixth Circuit.[26] The case involved fundamentalist Christians who asserted a right under the Free Exercise Clause to be exempt from having their children read the Holt, Rinehart, and Winston reading series. When the school board mandated that all children must read the series, objecting students refused to do so. Several were suspended, and the lawsuit ensued. The appeals court observed that to violate the Free Exercise Clause the government must have compelled or coerced a person either to affirm/disavow beliefs or to do or not do acts that are forbidden or required by a person's religion. Mere exposure to religiously objectionable material does not constitute an infringement on the students' right to freely exercise their religion. The court observed,

> There was no evidence that the conduct required of the students was forbidden by their religion. Rather, the witnesses testified that reading the Holt series "could" or "might" lead the students to come to conclusions that were contrary to teachings of their and their parents' religious beliefs. This is not sufficient to establish an unconstitutional burden.[27]

Several years later, the United States Supreme Court ruled that centrality of faith is not a prerequisite to finding a free exercise violation; sincerity of belief is sufficient. At the same time, the Court noted that religion is not entitled to be exempt from otherwise facially neutral and generally applied governmental statutes, even if some inconvenience is imposed.[28] Congress responded by enacting the Religious Freedom Restoration Act in 1993, which required government to show a compelling purpose when a person's religion is substantially burdened. However, in 1997, the high court struck down the law as applied to state governments as an infringement on the role of the Supreme Court to determine what the law is.[29] Thus, as things now stand, persons who claim religious-based exemptions from general governmental programs—including curricular requirements—have an uphill battle unless you live in a state such as Texas that has enacted a state law modeled after the now rejected federal statute. Such was the case with parents in Massachusetts, who contended in part that their free exercise rights were violated when their children were compelled to attend a sexually explicit AIDS awareness assembly. The First Circuit dismissed their complaint.[30] The same was true of parents of a home-schooled child in Oklahoma who argued their free exercise of religion rights were violated when the public school district refused to let the child take courses on a part-time basis. The Tenth Circuit noted that the policy is neutral and generally applicable. "It applies to students who are home-schooled for secular reasons as well as those home-schooled for religious reasons, and it applies to students attending private schools whether or not those private schools are religious or secular in orientation."[31]

Holiday Observance and Religious Music

The leading case on holiday observance remains *Florey v. Sioux Falls School District*, a 1980 decision of the Eighth Circuit, which has jurisdiction for a number of Midwestern states.[32] *Florey* involved a school policy allowing teachers to observe holidays that have both a religious and secular basis. Included among them were Christmas, Easter, Passover, Hanukkah, St. Valentine's Day, St. Patrick's Day, and Halloween. The school policy allowed explanation of the nature of the holidays in an unbiased and objective manner without sectarian indoctrination together with references to music, art, literature, and the use of religious symbols. The policy had been developed by a special committee representing various constituencies and faiths in the community. The committee had been set up after complaints about religious favoritism in the school had arisen. The court concluded that the program passed muster under the Supreme Court's *Lemon* decision.

At the same time, there are limits on what teachers can do in observing holiday programs. A good example is the eighth grade

American history teacher in the *Herdahl* case discussed earlier who wanted to balance the secular components of school holidays by showing religious videotapes. He explained that many children believe they are dismissed from school in December because of exams or the pending arrival of Santa Claus and in April because of the Easter bunny. So he showed videotapes such as "The King is Born" and "He is Risen." The court was not impressed, directing the school district to forbid its teachers from engaging in such obviously sectarian activities.[33]

Recently, the inclusion of religious songs in choir programs has become a matter of litigation. A particularly noteworthy example is a long running dispute in the Salt Lake City School District. The matter first arose in 1995 when a Jewish choir student objected to the singing of "May the Lord Bless You and Keep You" and "Friends" at high school graduation. The trial judge refused to halt the songs, a decision which the Tenth Circuit reversed. However, students and parents skirted the order by singing one of the songs anyway. The student continued her lawsuit, protesting the inclusion of religious songs in the choir repertoire and the requirement that the choir sing at Mormon temples. The trial judge rejected her claim, a decision that the Tenth Circuit upheld in a two-to-one decision in 1997.[34] The appellate court majority observed that there are secular reasons for including religious music in the choir program and for performing concerts in churches and other venues associated with religion, e.g., acoustical superiority. The Fifth Circuit ruled similarly with regard to use of the song "May the Lord Bless You and Keep You" as a Texas school choir's theme song. The court concluded that there were legitimate secular reasons for its use in this manner, noting that to forbid the district from having a theme song that is religious "would force [the district] to disqualify the majority of appropriate choral music simply because it is religious."[35]

Student Religious Papers, Presentations, and Tests

May students give presentations and write papers on religious topics in their classes? The prevailing view among the few federal courts that have heard the issue is that the classroom is a closed forum that remains under the control of the school and the teacher. Thus, under a 1988 United States Supreme Court precedent, unless the teacher has converted the classroom into a public forum, the teacher can control what students do as long as the teacher can show a legitimate pedagogical purpose.[36] Presentations and papers that proselytize a religious message to other students or that do not serve the purposes of the particular lesson being taught fulfill that purpose and may be excluded. Illustrations from the available case law demonstrate the point.

In a 1992 Michigan case, a federal district court ruled that there was no violation of a second grader's free speech rights when the teacher refused to allow the student to show a videotape of herself singing a proselytizing religious song to her class during show and tell.[37] The teacher had not converted the classroom into a public forum. The purpose of show and tell was to develop self-esteem through oral presentation, not provide an opportunity for indiscriminate public expression.

For the secondary school context, the 1995 ruling of the Sixth Circuit in *Settle v. Dickson County School Board* is the leading case.[38] In *Settle*, a ninth grader wanted to write a research paper on the life of Jesus. The teacher refused to approve the topic, contending that the student's strong Christian beliefs might lead to misunderstandings about any negative comments that the teacher might make in grading the paper. She also doubted the student would have to do much new research on the topic, contrary to the purpose of the assignment. The appellate court affirmed the trial court ruling that teachers deserve wide latitude in giving assignments. While the judges agreed that students do not shed their constitutional rights in schools, "learning is more vital in the classroom than free speech." The court added, "Papers on the transfiguration of Jesus and similar topics may display more faith than rational analysis in the hands of a young student with strong religious heritage—at least the teacher is entitled to make such a judgment in the classroom."[39] The ruling was appealed to the United States Supreme Court, which refused to hear it, thus leaving the Sixth Circuit decision standing.

The most recent decision involves a first grader in a New Jersey school who made a poster professing his thanks for Jesus in a response to a class assignment to make posters depicting things for which the students were thankful.[40] The posters were then placed in the school hallway. Someone removed the student's poster due to its religious theme. The teacher returned the poster to the display, but in a less conspicuous place. Some time later, the student wanted to read a Bible story to his class, but the teacher objected. The practice was for the teacher to approve all stories that the children wanted to read out loud. While other students read to the class, the student read the story to his teacher. The parents of the student sued, claiming denial of First Amendment free speech and religious freedom rights. The federal district court rejected the argument in a 1997 decision. The student had no right to have his poster displayed in any particular location; therefore moving it to a less conspicuous location did not deprived him of any right. Had the school allowed the poster to be prominently displayed, it could have been accused of advancing religion contrary to the Establishment Clause. Similarly, if the teacher had allowed the student to read the Bible story to the class, the impression could have been made that the teacher endorsed the Bible even by saying something like "very good" at the conclusion of the reading. Allowing the student to read the story to the teacher rather than to the class was a proper accommodation to his right of free expression and to the principle of separation of church and state.

At the same time, it is important to note that guidelines on religion and the school, first issued by the United States Department of Education in 1995, give support to student classroom presentations and papers on a religious subject. Those guidelines provide in part that:

> Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance, and against other legitimate pedagogical concerns identified by the school.

As a guideline, of course, this provision has less force of law than a judicial decision. It would be wise for school administrators and teachers who restrict students from delivering presentations and writing papers on religious topics to be prepared to show that the classroom has not been converted into a public forum for free expression and that there is a legitimate pedagogical purpose for their action.

Does a state-mandated testing program impose a set of beliefs upon students by influencing the design of the curriculum in violation of the First Amendment and the right of parents to control their children's upbringing? In *Tennison v. Paulus*, a 1998 decision of the Ninth Circuit, the court was confronted with a challenge to an Oregon law requiring schools to test students annually and promote only those who pass. The American Family Association in Tupelo, Mississippi, challenged the law on behalf of parents and students as imposing on the student's "freedom of mind" by forcing them to change their attitudes, beliefs, and opinions to conform to state-approved viewpoints, e.g., homosexuality, environmentalism, and moral relativism. The parents also argued that the law interfered with their rights to control their children's upbringing. The court rejected the lawsuit as without foundation.[41] A somewhat similar argument was made by an Ohio private school association against a statewide student testing program that encompassed both public and private schools. The Sixth Circuit found that submission to testing was well within the right of the state to reasonably regulate all schools.[42]

Recommendations for Practice

Taken together, the rulings to date involving the Establishment Clause and the Free Exercise Clause as applied to the public school curriculum indicate that local authorities have broad discretion, so long as they are essentially neutral with regard to religion. Neutrality does not mean hostility to religion; and as we noted at the outset, there are greater efforts now to accommodate religion in public school life. Here are key recommendations that emerge from this discussion.

- While the school cannot teach religion, it can teach about religion. Thus, inclusion of religious material in the curriculum as part of an otherwise secular program of instruction does not violate the Establishment Clause. Studying about religion is most commonly done in social studies classes. Works of religious literature are often studied in English classes. Religious music routinely is performed in music classes. Involvement of religion in the curriculum in this manner raises few legal questions.
- Courses in comparative religion and Bible study are most likely to withstand judicial scrutiny if taught objectively, if sources in addition to the Bible are used, if teaching religious doctrine is avoided, and if the teachers are not chosen for their religious beliefs. If the intent is to teach religion, rather than teach about religion, the courses are best taught off school grounds and without school sponsorship or involvement.
- As public employees, teachers must remain neutral in addressing religious topics in class and serving as role models for students.
- Requiring students to role-play religious rituals in class may constitute a violation of the Establishment Clause, especially if the rituals are not presented for historical or cultural purposes.
- Under the *Edwards* ruling, it is permissible for a school district to include in its curriculum scientific evidence associated with the creationist theory about the origin of man along with the scientific evidence associated with other explanations, if

the material is presented objectively with the secular intent of enhancing the effectiveness of science instruction. Teachers may not supplement the science curriculum with their own religious views. Obviously, teachers will need to exercise considerable care to be certain they do not cross this line. Likewise, principals would need to be vigilant to ensure that such teaching did not constitute proselytizing.

- Under current interpretation of the Free Exercise Clause, parents and students generally are not entitled to religious exemptions from school curricular policies that are generally applied and are neutral with regard to religion. An exception would be exposure of students to curricular material or practices explicitly prohibited by the student's faith. Religious-based exemptions may be available to parents and students under provisions of state law and school district policies. Thus, school officials should consult these sources before denying or granting exemptions.
- The *Florey* case provides a good rationale to follow regarding including religion in holiday programs. So long as the religious elements, including religious music, are one part of an otherwise secular holiday observance policy, and so long as they are presented objectively and without indoctrination, the program has a good chance of withstanding legal challenge.
- Student classroom presentations and papers on religious topics may be excluded when the classroom has not been converted into a public forum and when there are legitimate pedagogical reasons for the exclusion. However, given United States Department of Education guidelines to the contrary and given efforts to avoid discrimination against religion, administrators and teachers are best advised to tread carefully in this area.
- Administrators should be aware that with changing membership on the United States Supreme Court and with great efforts among a number of educational and legal commentators to expand the role of religion in public school affairs, interpretations of both the Establishment and Free Exercise Clauses may change in the future. Accordingly, administrators should monitor carefully future developments regarding the role of religion in the curriculum.

Some years ago, a coalition of fourteen organizations advanced six guidelines on teaching about religion in the public schools. These guidelines have been widely disseminated and represent a good way to end this chapter. They include: the school's approach to religion must be academic, not devotional; the school may strive for student awareness of religion but should not press for student acceptance of any one religion; the school may sponsor study about religion but may not sponsor the practice of religion; the school may expose students to a diversity of religious views but may not impose any particular view; the school may educate about all religions but may not promote or denigrate any religion; and the school may inform the student about various beliefs but should not seek to confine the student to any particular belief. Given the increasing diversity of religious beliefs in our communities, following these guidelines can go a long way to avoid controversy, conflict, and litigation.

References

[1] W. A. NORD and C. C. HAYNES, TAKING RELIGION SERIOUSLY ACROSS THE CURRICULUM. Association for Supervision and Curriculum Development (1998).

[2] *For example*, the Idaho Supreme Court pointed out some years ago that "By phraseology and diction of [article IX, § 5], it is our conclusion that the framers of our constitution intended to more positively enunciate the separation between church and state than did the framers of the U.S. Constitution." Epeldi v. Engelking, 488 P.2d 860 (Id. 1970), *cert. denied*, 406 U.S. 957 (bus transportation of students to private schools violates Article IX, Section 5 of the state constitution).

[3] Edwards v. Aguillard, 482 U.S. 578 (1987)

[4] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[5] Despite earlier backing away from the *Lemon* test, the Court majority appeared to rely upon them in Agostini v. Felton, 521 U.S. 203 (1997), to uphold a government program that permits public school teachers to deliver compensatory education on sectarian private school campuses. The decision overruled an earlier ruling to the contrary. Aguilar v. Felton, 473 U.S. 402 (1985). Writing for the majority in *Agostini*, Justice Sandra Day O'Connor observed that "the general principles we use to evaluate the Establishment Clause have not changed since *Aguilar* was decided." *Agostini*, at 222. Thus, the Court still looks to whether there is a secular purpose, whether there is an effect that advances or inhibits religion, and whether there is excessive governmental entanglement with religion. However, the criteria for judging effect and entanglement have changed. Justice O'Connor noted that merely placing public school teachers and officials on private school grounds does not, without more, advance religion. She also noted that religion is not advanced when the state provides as-

sistance "on the basis of neutral, secular criteria that neither favors nor disfavors religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, at 231.

[6] Lee v. Weisman, 505 U.S. 577 (1992) (school-sponsored sectarian and nonsectarian invocations and benedictions at school graduation ceremonies lend impermissible endorsement to a state-sponsored and directe.ed religious exercise and exert undue psychological pressure on nonconforming students to participate).

[7] School Dist. of Abington v. Schempp, 374 U.S. 222, 225 (1963).

[8] *See, e.g., Wiley v. Franklin, 468 F. Supp. 133 (E.D. Tenn. 1979); Hall v. Board of Sch. Comm'ns., 681 F.2d 965 (5th Cir. 1982); Crockett v. Sorenson, 568 F. Supp. 1422 (W.D. Va. 1983); Herdahl v. Pontotoc County Sch. Dist., 933 F. Supp. 582 (N.D. Miss. 1996); Gibson v. Lee County Sch. Bd., 1 F. Supp.2d 1426 (M.D. Fla. 1998).*

[9] Gibson v. Lee County Sch. Bd., 1 F. Supp.2d 1426, 1434 (M.D. Fla. 1998).

[10] Herdahl v. Pontotoc County Sch. Dist., 933 F. Supp. 582 (1996), *supplemented*, 964 F. Supp 1113 (N.D. Miss. 1997) (attorney fees and costs).

[11] *Herdahl*, 933 F. Supp. 582 at 595.

[12] Marchi v. Board of Cooperative Educational Services of Albany, No. 98-7213, 173 F.3d 469, 476 (2d Cir 1999), *cert. denied*, 120 S. Ct 169 (1999).

[13] Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 112 S. Ct. 3025 (1992).

[14] Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 521 (9th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995).

[15] Smith v. Board of Comm'ns. of Mobile County, Ala., 827 F.2d 684, 692 (11th Cir. 1987).

[16] Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680, 688 (7th Cir. 1994). The Ninth Circuit ruled similarly in a challenge to "Impressions." The court did note, however, that having students perform religious rituals could constitute a violation of the Establishment Clause, unless the rituals were presented for historical or cultural purposes. The court cited as examples of the latter, acting out a ceremonial American Indian dance, reenacting the Last Supper, or conducting a Passover dinner. But the appeals court judges noted that the challenged role-playing activities from the challenged selections in "Impressions" were not formal religious rituals.

Brown v. Woodland Joint Unified School District, 27 F.3d 1373 (9th Cir. 1994).

[17] Guyer v. School Bd. of Alachua County, 634 So. 2d 806 (Fla. Dist. Ct. App.), *review denied*, 641 So. 2d 1345 (Fla.), *cert. denied*, 115 S. Ct. 638 (1994).

[18] Altman v. Bedford Central Sch. Dist., 45 F. Supp.2d 368 (S.D.N.Y. 1999).

[19] Edwards v. Aguillard, 482 U.S. 578 (1987).

[20] *Id.* at 594.

[21] Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 345-346 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 2706 (2000).

[22] Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995).

[23] Webster v. New Lennox Sch. Dist. No. 12, 917 F.2d 1004 (7th Cir. 1990).

[24] West Virginia State Bd. of Educ. v. Barnette, 319 U.S 624 (1943).

[25] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[26] Mozert v. Hawkins County Sch. Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987). *See also*, the earlier ruling of the Ninth Circuit in Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985) (use of the book THE LEARNING TREE in the public school classroom does not establish secular humanism as a religion and, because the school exempted the student from reading it, her free exercise claim could not be considered).

[27] *Id.* at 1070.

[28] Employment Division of Oregon Department of Human Resources v. Smith, 494 U.S. 872 (1990).

[29] City of Boerne v. Flores, 521 U.S. 507 (1997).

[30] Brown v. Hot, Sexy, and Safer Productions, Inc., 68 F.3d 525 (1st Cir. 1995).

[31] Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 698 (10th Cir. 1998). *See also* Hubbard v. Buffalo Indep. Sch. Dist., 20 F. Supp.2d 1012 (W.D. Tex. 1998) (no violation of free exercise rights when public school required a student transferring from an unaccredited private school to pass a test to prove proficiency in the courses for which the student claimed credit).

[32] Florey v. Sioux Falls Sch. Dist., 619 F.2d 1311 (8th Cir. 1980), *cert. denied*, 449 U.S. 987 (1980).

[33] Herdahl v. Pontotoc County Sch. Dist., 933 F. Supp. 582, 599 (1996).

[34] Bauchman v. West High Sch., 900 F. Supp. 254 (D. Utah 1995), *affd*, 132 F.3d 542 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 2370 (1998).

[35] Doe v. Duncanville Indep. Sch. Dist., 70 F.2d 402, 407 (5th Cir. 1995).

[36] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988). While the *Hazelwood* case involved a school-sponsored student newspaper, the Court observed that its ruling applied to yearbooks, theatrical productions, and "other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood* at 271. (For an activity to fall into the school-sponsored category, the Court noted that it must be supervised by a faculty member and be designed to impart particular knowledge or skills. In the words of the Court, educators are entitled to exercise greater control over student expression through school-sponsored channels of communication "to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that is inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." *Id.* While the high court did not specifically address its decision to the classroom, lower federal courts have applied the Court's reasoning to this setting as well).

[37] DeNooyer v. Livonia Public Schs., 799 F. Supp. 744 (E.D. Mich. 1992), *aff'd sub nom*, DeNooyer v. Merinelli, 12 F.3d 211 (6th Cir. 1993).

[38] Settle v. Dickson County Sch. Bd., 53 F.3d 152 (6th Cir.), *cert. denied*, 516 U.S. 989 (1995).

[39] *Id.*

[40] C.H. v. Oliva, 990 F. Supp. 341 (D.N.J. 1997), *aff'd by equally divided vote*, 226 F.3d 198 (3d Cir. 2000)(en banc).

[41] Tennison v. Paulus, 144 F.3d 1285 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 800 (1999).

[42] Ohio Association of Indep. Schs. v. Goff, 92 F.3d 419 (6th Cir. 1996), *cert. denied*, 520 U.S. 1104 (1997).

24

Educational Curriculum

Carrie Y. Ausbrooks and Jane B. Huffman

Introduction

The instructional program content—the curriculum—provides the framework for inculcation of democratic values to ensure a well-informed, responsible citizenry. Consequently, curriculum policies and instructional activities are expected to reflect both public and community values, which may be in conflict. Also, public schools are to be forums where children learn from a multiplicity of ideas. While states tend to be directly involved in curricular processes with respect to graduation requirements, curriculum guidelines and frameworks, textbook selection[1] and implementation of the curriculum and its content continue to be primarily at the discretion of local boards of education. Although courts generally acknowledge state and local power over education and are reluctant to interfere with curriculum decisions, they are continually being called upon to rule on issues in this area. Curriculum issues most frequently contested in the courts of law include: the role of values in the curriculum, sectarian interests and beliefs reflected in the curriculum, removal of material from instructional programs, removal of library books, the study of evolution and creationism, appropriateness of sex education programs, and issues concerning bilingual education.

Legal Issues

Values and Their Role in the Curriculum

In partnership with the church and home, schools have traditionally been expected to play a role in transmitting democratic values to its citizens. As values influencing institutions, schools have been given responsibility for providing enculturation through routine encounters and through academic experiences. The purpose of such enculturation is to provide a common set of beliefs that cross racial, class, and ethnic lines toward maintaining social unity despite the diversity of the American population. How can this be accomplished amid often conflicting parental, community and societal interests? In Maine, schools are required to teach virtue and morality as well as about the American flag. Although these values are mandated, local school boards are generally given discretion in selecting the specific values that will be taught and their role in the school curriculum. This was evident in the case, *Solmitz v. Maine School Administrative District,*[2] which involved efforts to inculcate values through a school's curriculum. The court ruled that individuals have no right to insist upon a specific curriculum.

Removal of Materials from the Instructional Program

Throughout the history of public schooling, content promoting sectarian interests and beliefs has been challenged in the courts. Religious groups have attempted to impose their views on public education and to have their beliefs adopted as official school policy. The courts have ruled that school boards must have a legally permissible reason for removing books. In other words, the removal cannot be based upon "disagreement with the constitutionally protected ideas contained in the books" nor "upon the board's desire to impose upon the students a religious [or political] orthodoxy."[3] In *McCollum v. Board of Education,*[4] *Board of Education Island Trees Union Free School v. Pico,*[5] *Pratt v. Independent School District No. 831,*[6] and *Grove v. Mead School District No. 354*[7] the courts resisted attempts by religious groups to compel schools to remove offending materials citing that, should this take place, very little curricular substance would remain. In the *Pratt* case, the court also ruled it unconstitutional for a school board to reject textbooks based on racial discrimination.

The courts have been more inclined to find in favor of some administrative discretion in removal or exclusion of material. In *Hazelwood School District v. Kuhlmeier,*[8] the Supreme Court upheld excision of two pages from the student newspaper by the principal. In deleting the two pages, one of which dealt with teen pregnancy and a second with divorce and its effects on students, the Court agreed with the principal that the articles were not protective enough of the identities of the students and that, in the instance of teen pregnancy, some of the descriptions of sexual involvement were inappropriate for the younger students to read. However, when the material is neither school sponsored, nor produced on school equipment, officials have limited control over its content as in the *Beussink v. Woodland R-IV School District*[9] case, when a student criticized the school administration on his personal website.

The district court ruled that a desire to avoid discomfort or unpleasantness is insufficient justification for prohibition of a particular expression of opinion in the absence of material and substantial interference with requirements of appropriate discipline in the operation of the school. One court has ruled that even if materials express racially biased views, absent evidence of intent to discriminate, neither the Equal Protection Clause nor Title VI of the Civil Rights Act of 1964 is violated.[10]

In the case, *Virgil v School Board of Columbia County, Florida,*[11] parents objected to a textbook, which contained both required and optional readings for a course in humanities. The objection centered on two optional readings, Chaucer's "The Miller's Tale" and Aristophanes' "Lysistrata". Both contained sexually explicit material. Upon review of the material by a school board advisory committee, the committee recommended continued use of the textbook in the instructional program but advised against use of the readings in question. When the committee's report was brought before the board of education, the superintendent disagreed and proposed the two readings either be deleted from the texts or that use of the textbooks be discontinued. As a result of the superintendent's proposal, the board voted to discontinue use of the textbooks. In response to this decision, parents at the school filed an action against the school board charging that they had violated the students' First Amendment rights. The court ruled that the school board may take such action as is "reasonably related to legitimate pedagogical concerns."

In a higher education case, *Loving v. Boren,*[12] the court upheld the University of Oklahoma's policy restricting Internet access on its servers since unrestricted computers were made available for academic and research purposes as an alternative. The appeals court affirmed the district court ruling that since The University of Oklahoma's computer and Internet services did not constitute a public forum, it had a right to restrict access to certain material through its news server without violating the First Amendment. Although the courts have not yet addressed this issue with regard to public school student use of the Internet, it is clear that schools have the right to determine the scope of student access to school resources.

Removal of Library Books

Two cases highlight the court's proclivity to support the prerogative of school boards in selecting and discontinuing instructional materials. In two instances, *Bicknell*[13] and *President's Council,*[14] the Second Circuit upheld a school board's actions in removing books from school libraries. The court noted that there are no stipulations that once books are on the shelves they will remain there forever. According to the court's decision, removal of obscene materials does not threaten suppression of ideas. In the *President's Council* ruling, the court stated that oversight of a school library "involves a constant process of selection and winnowing based not only on educational needs but financial and architectural realities."

In a 1980 case, the Seventh Circuit held that schools can determine what constitutes good citizens and develop curriculum and materials that will foster the development of good citizens. Further, school officials may "prohibit the use of texts, remove library books, and delete courses from the curriculum as a part of the effort to shape students into good citizens."[15] However, in *Board of Education v. Pico,*[16] the Supreme Court overruled previous findings when it did not support a board of education when they excluded books based on seemingly theistic beliefs or dislike of the ideas contained in the books. The *Pico* case still plays a critical role in this area. Three cases illustrate how the *Pico* case has been applied more recently in school library controversies. In Kansas,[17] a conflict resulted from the inclusion in the school library of the book, Annie on My Mind, which tells the story of a romantic relationship between high school girls. When the local newspapers brought public attention to the fact that the Gay and Lesbian Alliance Against Discrimination had donated the book, protests erupted, including the burning of the book on the steps of the school district's offices. The school board, on the advice of the district's attorney, supported the superintendent's decision to remove the book from the school library. However, in ruling against the district, the court reasoned that the book was removed because of board members' personal disapproval of the ideas contained in the book, rather than because it undermined "traditional family values." In California,[18] an appeals court ruled against a school district that wanted to remove books from a high school library because they were not "socially acceptable" and contained offensive language. It was found that the board could not remove the books based upon "their perceived offensive content."

Litigation has begun in the area of computer use and the Internet. One such case was *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*[19] in which a Virginia federal district court followed the precedent established in the *Pico* case. In this case, the library used site-blocking software on its Internet computers to prevent children from gaining access to "material deemed harmful to juveniles." However, the software only blocked sites that it recognized, not all potentially harmful sites, but also prevented access to certain items protected by the First Amendment's Free Speech Clause. The court ruled that restricting access in this case was the same as removing books from its shelves, hence a violation of the First Amendment. In quoting from the *Pico* case, the court noted a difference between public libraries, places of "free-wheeling and independent inquiry," and school places where "fundamental values" are inculcated.

Evolution Science versus Creation Science

In a 1968 Arkansas case, *Epperson v. State of Arkansas*,[20] the Supreme Court found that a state statute violated the First Amendment by disallowing scientific theory to be taught because it conflicted with Biblical doctrine. In a 1987 case, the Court was asked to rule on Louisiana's "Creationism Act."[21] The act forbade the teaching of evolution in public schools unless accompanied by instruction in creation-science. In responding to the legal challenge, the Court cited the Establishment Clause, which forbids enactment of a law "respecting an establishment of religion." In applying the three-pronged *Lemon* test,[22] the Court determined that no clear secular purpose was found in the action of the legislature. It was clear from the legislative history that the intent of the bill's sponsor was to narrow the science curriculum. Further, the Court found that the Creationism Act required that curriculum guides be developed for creation science but not for evolution; that research services were supplied for creation science but not for evolution; that only creation-scientists would be allowed to serve on a panel for resource services; and that discrimination was forbidden against anyone choosing to teach creation-science while no similar protection was offered for those who taught evolution or other noncreation theories. Thus, the act did not preserve academic freedom but, rather, served to discredit evolution.

Fundamentalists have charged that the theory of evolution actually constitutes a religion called secular humanism, which protrays life in nonmoral and nontheistic terms. In *Mozert v. Hawkins County Board of Education*,[23] a group of public school parents objected to the textbooks adopted by the board of education and the teaching of "critical reading." Parents stated that the values taught in the texts were contrary to their religious beliefs. They further charged that the texts presented the theory of evolution and propounded a religion of secular humanism and ideas of "futuristic supernaturalism" which portrayed "Man as God." Testimony by the plaintiffs indicated that they did not want their children attempting critical judgments. The Sixth Circuit found no evidence that the schools sought to provide tolerance of divergent religious views. The curriculum was designed to present a wide range of ideas and concepts. When a biology teacher in California objected to a school district's requirement that he teach about evolution without teaching creationism, he claimed that evolution and secular humanism were religious; the Ninth Circuit disagreed.[24]

In a similar case in the Eleventh Circuit concerning allegations by fundamentalist Christians, the court ruled that textbooks used in the public schools of Mobile County, Alabama, unconstitutionally established secular humanism as a religion.[25] The court ruled that the district had not breached the Establishment Clause but was utilizing books whose content happened to coincide with the view of secular humanism. The court found no endorsement of religion on the part of the schools nor a nonpermissible advancement of religion. The court also ruled that the message of the texts was a neutral one, neither endorsing theistic religion nor discrediting it.

Sex Education Programs

One of the most contested areas in school curriculum is in the area of sex education. Several cases concerning sex education in the curriculum have been heard by the courts. Religious bodies have challenged sex education course offerings stating an encroachment of religious liberty and privacy. The courts have consistently found that the courses present public health information that furthers educational objectives. In *Cornwell v. State Board of Education*,[26] Baltimore County taxpayers sought to prevent implementation of a program of sex education in the Baltimore County Schools. Plaintiffs stated that parents had the exclusive constitutional right to instruction in sexual matters under the First Amendment. The court ruled that the state's interest in the health of its children outweighted the claims of the plaintiffs.

In similar cases, a New Jersey court upheld the state's comprehensive sex education mandate, stating that the curriculum guidelines did not suggest antagonism toward Christianity.[27] In a Pennsylvania case, the state's interest in the health and welfare of its children was cited as a significant finding.[28] In two cases, concessions to opponents of sex education classes have been granted. In *Valent v. New Jersey Board of Education*,[29] the court acknowledged that students should be free to be excused from classes if it is deemed that such instruction is in opposition to their sectarian beliefs. Similarly, a California court of appeals[30] and the Supreme Court of Hawaii[31] ruled that a sex education program is constitutional if students may legally be excused from the class. However, the New Jersey Commissioner of Education ruled that a sex education course is constitutional even if it is a required course.[32]

Special Student Groups

A seminal case in the area of bilingual education was *Lau v. Nichols*, decided in 1974.[33] Plaintiffs cited the Civil Rights Act of 1964 which bans discrimination in any federally-funded program on the basis of race, color, or national origin. The San Francisco School District, which received federal funds, was charged with failure to provide non-English speaking Chinese students with instruction to bridge the language gap. The Supreme Court ruled that where students from minority groups lacked the ability to speak and understand English, the district must provide programs to respond to the language deficiency. The Court reasoned that since English skills are prerequisite to participation in public school programs, failure to provide instruction constituted inequality of treatment. In later rulings, the courts have tended to give discretion to school districts in meeting requirements of language instruction. The Ninth Circuit ruled in 1978 that not all programs were required to be bilingual according to the United States Constitution and civil rights laws.[34]

The enactment of the Equal Educational Opportunities Act was used in a 1981 case. The Fifth Circuit found that, while required to offer remedial programs, school districts could enjoy some latitude in meeting the requirements.[35] Therefore, the court found the district's bilingual program to be nondiscriminatory. Subsequent charges that the district's practice was racially and ethnically discriminatory brought a similar finding of nondiscrimination by the court.[36] The Bilingual Act of 1974 does not specify that language instruction be offered in a child's native language to allow for effective progress.

Recommendations for Practice

The curriculum is tightly linked to the expectations of both the community and society. America's demographic diversity can result in very different expectations, increasing the potential for conflict. Legal challenges have arisen in the areas of parent's rights regarding school curriculum, theistic versus nontheistic study, removal of textual materials from school programs, removal of books from school libraries, sex education, and ensuring that students with limited English proficiency may access educational opportunities.

While few cases have been heard by the courts regarding computers and Internet use, litigation in this area is likely to increase. Future litigation can also be expected in the area of secular challenges in which there is increased conflict with regard to the values inculcating role of schools balanced against the right of parents to control their children's education and curricular content of educational programs. School administrators can better prepare themselves to meet these and other curriculum-related challenges by being cognizant of the following key points:

- Local school boards are provided discretion in the selection of the values that their schools will emphasize.
- Offensive materials of a sexually explicit nature can be removed or excluded from the school program when appropriate.
- Removal of books from libraries should not be based on dislike of the ideas contained in them or specific theistic beliefs.
- The use of internet site blocking software will likely withstand legal challenges so long as such controls are pedagogically justified.
- School districts may neither offer special protections for programs promoting creationism nor prohibit the teaching of evolution theory.
- Sex education programs have been upheld by the courts on the basis of their contribution to public health.
- While language instruction programs for non-English speaking students have been required by the courts, specific implementation is the prerogative of individual school districts.
- Students with disabilities should be learning the same things as students in the regular education program to the maximum extent possible. In short, their individualized education plans must not only meet their needs resulting from the disability, but also must be congruent with the regular curriculum.

References

[1] *Academic Freedom in the Public Schools: The Right to Teach*, 48 N.Y.U. L. REV. 1183 (1973).

[2] Solmitz v. Maine Sch. Admin. Dist. No. 59, 495 A.2d 812 (Me. 1985).

[3] McCarthy v. Fletcher, 254 Cal. Rptr. 714 (Ct. App. 1989).

[4] People *ex. rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948).

[5] Board of Educ. Island Trees Union Free Sch. Dist. No 26 v. Pico, 457 U.S. 853 (1982).

[6] Pratt v. Indep. Sch. Dist. No. 831, 670 F.2d 771 (8th Cir. 1982).

[7] Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528 (9th Cir. 1985).

[8] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

[9] Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp.2d 1175 (E.D. Mo. 1998).

[10] Grimes v. Cavazos, 786 F. Supp. 1184 (S.D.N.Y. 1992).

[11] Virgil v. School Bd. of Columbia County, Fla., 862 F.2d 1517 (11th Cir. 1980).

[12] Loving v. Boren, 133 F.3d 771 (1998).

[13] Bicknell v. Vergennes Union High Sch. Bd. of Directors, 638 F.2d 438 (2d Cir. 1980).

[14] President's Council, Dist. 25 v. Community Sch. Bd. No. 25, 457 F.2d 289 (2d Cir. 1972), *cert. denied*, 409 U.S. 998 (1972).

[15] Zykan v. Warsaw Community Sch. Corp. 631 F.2d 1300, 1303 (7th Cir. 1980).

[16] *McCollum*, 333 U.S. 203 (1948).

[17] Case v Unified Sch. Dist. No. 233, 908 F. Supp. 864 (D. Kan. 1995).

[18] Wexner v. Anderson Union High Sch. Dist., 258 Cal. Rptr. 26 (Cal. Ct. App. 1989).

[19] Mainstream Loudoun v. Board of Trustees of the Loudoun County Library (*Loudoun I*), 2 F. Supp.2d 783 (E.D. Va. 1998).

[20] Epperson v. State of Ark., 393 U.S. 97 (1968).

[21] Edwards v. Aguillard, 482 U.S. 578 (1987).

[22] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[23] Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987).

[24] Pelazo v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1994), *cert denied*, 515 U.S. 1173 (1995).

[25] Smith v. Board of Sch. Comm'rs. of Mobile County, 827 F.2d 684 (11th Cir. 1987).

[26] Cornwell v. State Bd. of Educ., 314 F. Supp. 340 (D. Md. 1969), *affirmed* 428 F.2d 471 (4th Cir. 1970), *cert. denied*, 400 U.S. 942 (1970).

[27] Smith v. Ricci, 446 A.2d 501 (N.J. 1982), *appeal dismissed sub nom.*, Smith v. Brandt, 459 U.S. 962 (1982).

[28] Aubrey v. School Dist. of Philadelphia, 437 A.2d 1306 (1981).

[29] Valent v. New Jersey State Bd. of Educ., 274 A.2d 832, 840-41 (N.J. Super. Ct. App. Div. 1971).

[30] Citizens for Parental Rights v. San Mateo City Bd. of Educ., 124 Cal. Rptr. 68 (Ct. App. 1975).

[31] Medeiros v. Kiyosaki, 478 P.2d 314 (Haw. 1970).

[32] J.B. and B.B. as Guardians and Natural Parents of P.B. and J.B. v. Dumont Bd. of Educ., Dec. of N.J. Comm'r of Education (1977).

[33] Lau v. Nichols, 414 U.S. 563 (1974).

[34] Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3, 587 F.2d 1022 (9th Cir. 1978).

[35] Casteneda v. Pickard, 648 F.2d 989 (5th Cir. 1981).

[36] Casteneda v. Pickard, 781 F.2d 456 (5th Cir. 1986).

25

Copyright Issues in the Electronic Classroom

Kenneth E. Lane, Dennis W. Van Berkum,
and Michael D. Richardson

Introduction

The electronic delivery of courses has become widespread internationally. Legal and ethical issues are arising at an ever-increasing rate. Traditionally, school personnel use copyrighted books, videos, taped recordings, and other such recordings in classrooms. With the advent of multimedia presentations and technologies such as web pages, school personnel are integrating these resources into original works providing greater flexibility for instruction and learning.[1] This development is requiring guidance and in-depth understanding of copyright laws and intellectual property as instructors develop courses, support materials, determine the posting of interaction, and Internet links for classes. Further, school officials and instructors are debating the ownership of the courses developed for electronic delivery including interactive television and the Internet. As a pre-cursor to this discussion, it must be understood that the issues of intellectual property and copyright law are intertwined, not separate entities.

Legal Issues

Intellectual Property And Copyright Issues

Using the Internet to teach and post materials changes the economics of content because it allows one to copy for free. On the Internet, it is easy to copy information although it may be difficult to find it. Intellectual property will continue to be distributed free and suppliers will increase dramatically in numbers. Thus, for supporters of intellectual property, the best course of action may be to distribute the intellectual property free in order to sell one's services and relationships.[2]

Realistically, any work posted on the Internet can be instantly copied and reproduced anywhere in the world. The use of login names and passwords for accessing intellectual property is not a deterrent. Computer hackers may break into the system, or students accessing the course can copy the materials and pass them along to other people. Furthermore, teachers and instructors at schools and universities will gain access to your material. The question becomes how tightly do you want to control your materials? Dyson describes the issue of posting intellectual property on the Internet best. She states:

> The question of what happens to intellectual property on the Net may be summed up like this: value shifts from the transformation of bits rather than the bits themselves, to services, to the selection of content, to the presence of other people, and to the assurance of authenticity [with] reliable information about sources of bits and their future flows. In short, intellectual assets and property depreciate while intellectual processes and services appreciate.[3]

The former Clinton Administration had proposed that the right to lend should not apply to digital works. This along, with a narrower interpretation of fair use, has the educational community concerned. If this proposal on intellectual property had been approved by Congress, the rights of people to browse, share, or make private non-commercial copies of copyrighted works would be rescinded. Your on-line service provider would have been required to search your files to determine if you have unlicensed materials. The result would have been that the public would be stripped of all the rights the copyright law has long recognized—including the rights of privacy.[4]

Since the current Copyright Law protects the written works of a person for one's life plus 50 years, a case can be made that materials created by and posted on the Internet by an instructor for teaching purposes are protected. However, as pointed out vividly above, protected and free from copying on the Internet are not one in the same. Furthermore, the very nature of the use of the Internet as a delivery system for distance education raises a question. How do the new technologies, such as compressed video and teleconferencing which allow the teacher to be electronically face-to-face with students in several locations at various times, affect the literal definition concerning a teachers interaction with a class that traditionally shared the same physical location.

Copyright protection is a form of protection provided to the authors of "original works of authorship" including literary, dramatic, musical, artistic, and certain intellectual works. This protection is available for both published and unpublished works and begins at the creation. According to the Copyright Act of 1976 (Section 106), copyright owners have the exclusive right to 1) the reproduction of work, 2) prepare derivative works based on the original work, 3) distribute copies of the work, 4) perform the work publicly, and 5) display the work publicly. However in Section 107 of the act, the legal principle of "Fair Use" provides for certain limitations on the exclusive rights of the copyright holder. Four factors are identified to consider "fair use" on an individual basis. These factors include: 1) the purpose and use, including whether such use is of a commercial nature or is for nonprofit educational purposes, 2) the nature of the copyrighted work (courts have favored nonfiction for fair use over fiction), 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole (even a small portion could be substantial if it constitutes a central or critical part of the original work), and 4) the effect of the use upon the potential market or value of the copyrighted work.

As technologies change, so will the interpretation of the copyright laws change. Many cases challenge the previous interpretations of the copyright law in both civil and criminal courts. Recently commercial copyright violations involving more than 10 copies with a value of $2500 was made a felony. The first criminal case testing this copyright statute involved a computer Bulletin Board System (BBS) operator, Davey Jones Locker. He was sentenced to 24 months probation, six months home confinement, and loss of all computer equipment for distribution of copyrighted programs without permission of the publishers.[5]

One of the first civil cases to test the copyright law in relationship to technology was *Sony Corp. v. Universal City Studio.*[6] The question presented to the Court was whether the sale of copying equipment (VCRs) to the general public violated any of the rights conferred upon the broadcasting industry by the'Copyright Act. The court answered "no," stating that the primary use of the machine for most owners was "time-shifting," the practice of recording a program to view it once at a later time and thereafter erasing it. Time shifting enables viewers to see the programs they otherwise would miss. Further, the Court recognized that a substantial number of owners do collect a library of recorded programs, but no evidence was given for decreasing television viewing. Nowhere in the Act is there evidence that the Congress has made it unlawful to copy a program for later viewing at home, or has enacted a prohibition against the sale of machines that make such copying possible. Finally, the Act does not expressly make anyone liable for infringement committed by another.

From Scotland, *Shetland Times, Ltd. v. Will*[7] provides insight into potential problems in setting links for a course or web page. In this case, the *Shetland Times* (The Times) asked the court to temporally prevent the *Shetland News* (The News) from maintaining that the links constituted infringement to copyright. The Times operates a site on the WorldWide Web (WWW), which makes available many of the articles in the printed version of its newspaper. The "front page" of the Times' site consists of a number of new headlines with embedded links to corresponding articles. The News, a competitor to the Times, also operated a web site. The News had reproduced, on its own front page, the headlines appearing on the Times' front page and linked them to articles on pages created and maintained by the Times, bypassing the front page of the Times. The Times claimed that the News, by linking to a subsidiary story page in the Times' web site creates the appearance that the proprietary stories published by the Times originated at the News' web site. They insist that the defendant's links should be to their home page. The presiding judge agreed that the Times had presented a *prima facie* case of copyright infringement based upon the United Kingdom's law governing cable television providers.[8]

The case of *Princeton University Press v. Michigan Document Services (MDS)*[9] presents an issue of fair use of publisher's materials in the creation of course packets for students at nearby universities. Course packets have often contained journal articles, newspaper articles, course notes, syllabi, sample test questions, and excerpts from books. MDS created the course packets for professors and students at nearby universities. MDS added a table of contents identifying each work by author and name of the work and gave the course packets page numbers and a binding. They charged a fee per page that was the same regardless of the content or copyright status of the pages, and sold its course packets only to students for particular courses. Princeton University Press and St. Martin's Press challenged this practice based upon violation of copyright by duplication of copies for sale by a for-profit corporation that failed to pay royalties. The lower court ruled in their favor. However, in February of 1996 the Sixth Circuit Court reversed the opinion of the lower court and found that MDS made a fair use of the plaintiff publishers' materials in the creation of course packets for professors and students at the nearby universities. That same year, the Sixth Circuit withdrew its opinion and issued a new opinion affirming the lower court's opinion on infringement, but not finding a willfulness in the act. The appellate court found that MDS is a commercial copy shop that reproduced substantial segments of copyrighted works of scholarship, bound the copies into course packets and sold them to students. The excerpts examined contained plaintiffs' publications ranging in size from five percent to thirty percent of the material in each publication. They did find, however, that the defendants' belief that their copying constituted fair use was not so unreasonable as to be considered willfulness.

Another case, *Ticketmasters Corp. v. Microsoft Corp.*,[10] offers insight into the use of trademarks and links that limit displays intended to be viewed by an audience when the website is opened. In this case, Ticketmasters claimed that the "Seattle Sidewalk" guide on Microsoft's website illegally used the name of Ticketmaster and its trademark by providing links that circumvented the beginning pages of Ticketmaster's website, which displays advertisements, products and services of entities with which Ticketmaster contracts and has linked to the subsidiary pages of the website. Further, Ticketmaster alleged that Microsoft was profiting from the Ticketmaster name and that Microsoft was using Ticketmaster's content to generate advertising revenue. The courts found that use of the domain name identical to another's federally registered trademark is infringement. Trademark infringement can also occur when a site utilizes the mark of another, creating confusion with the consuming public. The seamless connection that occurs when a link is activated and a user is relocated from one web site to another may cause a blurring in the distinction between the proprietary material of the original site and that of the linking sites. If the link embedded in the text is distinguished by a proprietary image or logos, then trademark infringements may occur.[11]

Intellectual Property Policy

Today, many educational institutions have limited policies or no policies at all concerning the use of intellectual property. Dalziel has stated that the lack of guidelines for educational multimedia places a huge burden on educators to take advantage of today's teaching technologies.[12] For example, one university has had an intellectual property policy in place since December 1993.[13] While the policy addresses primarily inventions and discoveries, it is aimed at ensuring the protection of the traditional rights of university scholarship and the facilitation of that protection. The policy does state that all discoveries and inventions that occur are the property of the university unless the inventor can clearly demonstrate that "no University time or facilities were used." However, the policy does not address the posting of intellectual property on the Internet when teaching classes. Why? The policy is outdated. When it was created, teaching on the Internet was not being done or considered as a possibility. This situation is reflective of many educational institutions—both K-12 and university. As should be the situation with all educational institutions, the policy is now being reviewed in light of the University Copyright Committee's work in creating a workable policy for the campus community addressing both copyright and intellectual property.

One aspect of the review process should be researching current issues on copyright and intellectual property rights. A good start would be viewing the *Shifting Boundaries of Intellectual Property: Copyright, Intellectual Property, and Publishing* on the WWW Internet site http://139.182.93.107/hypertch/copyright.htm.[14] The site provides a set of links to information on issues of copyright, intellectual property, and fair use.

School Districts And Copyright Issues

As schools prepare students for working environments that will be much more involved with the Internet than current environments, the concepts of intellectual property and copyright will be challenged. The transfer of information via the Internet is continuing to raise significant issues in regard to ownership. It is one of the responsibilities of schools to lay the groundwork for responsible use and compliance with the laws regarding copyright and intellectual property.

Kim Owen, Instructional Technology Specialist with the Center for Innovation in Instruction at Valley City State University in North Dakota, has addressed these issues quite well. Owen describes the responsibilities that the school board and the superintendent have for insuring that the district adheres to the law in providing and managing access to the Internet by students, staff, faculty and administration. The district has the responsibility for developing and administering policies in these areas. Owen (1999) states that:

> The most common method for dissemination of these policies is through the development and enforcement of the policies in an Acceptable Use Policy (AUP) that is agreed to by all users. The role of the AUP is to indicate what is acceptable use of the district network system and available network resources.... All district employees also have an obligation to use the district system in a manner specified by their employer....Therefore it is logical to ex-

> pect that districts will take measures to exert control over the use of the district system....[15]

Implementing these policies also requires holding students and their parents responsible for adhering to approved acceptable use policies. This will be especially true in those situations where the district is the provider of Internet access via a modem from the home.

Final Thought

The issue of intellectual property and copyright is not easy or clear-cut. The ease of use of materials on the Internet makes enforcement of copyright and intellectual property rights extremely difficult. In the long run, it all boils down to what we believe about ideas. Maybe it is time to consider what Thomas Jefferson said almost 200 years ago:

> If nature has made any one thing less susceptible than all others or exclusive property, it is the action of the thinking powers called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives and idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she make them, like fire, expandable over all space, without lessening their density at any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject or property.

Recommendations For Practice

Based upon the uncertainties associated with posting materials on the Internet for teaching purposes, the following guidelines are suggested by the authors and found in the Fair Use Guidelines for Educational Multimedia.[16]

- Do not post anything you do not want copied.
- Consider membership to or subscription to your course pages residing on the Internet.
- Consider login names and passwords to protect your materials and copyrighted materials.
- Incorporate only portions of lawfully acquired copyrighted works in your multi-media presentations.
- Consider the use of published software for Internet teaching such as WebCT and Web Sentinel.
- Place a copyright statement on the homepage you create for your course(s).
- Consult with your district to decide whether the material, including graphics, video clips and pictures, are the property of the district or whether the district will enter into a signed agreement that those materials are owned by you personally.
- Decide whether you are more interested in financial gain or sharing openly and freely your ideas in teaching via the Internet. This decision will guide your actions in posting materials.
- Lawfully acquired copyrighted materials may be used for a period of up to two years. For use beyond that time, you should seek additional approval.
- All Students in your classes should be instructed about the reasons for copyright protection.
- Seek individual permission before using copyrighted works in educational multimedia projects for distribution.
- Be cautious in downloading material from the Internet. A mix of works protected by copyright and works in public domain exist on the network. The mere fact the work is published on the Internet does not automatically indicate that the material may be copied.
- Exercise integrity when altering another's works and advise your audience to the alterations.

References

[1] Consortium of College and University Media Centers, (1997). *Fair Use Guidelines for Educational Multimedia: The Final Document and Its Implementation*. Ames, IA: Consortium of College and University Media Centers.

[2] E. DYSON. (1995). *Intellectual value*. WIRED [On-line], 3.07. http://www-swiss.ai.mit.edu/6805/articles/int-prop/dyson-wired-7-95.html.

[3] *Id*.

[4] P. SAMUELSON. (1998). *The copyright grab.* WIRED [On-line], 4.01. http://www.wired.com/wired/4.01/features/white.paper.html

[5] B. O'MAHONEY. (1998). *The Copyright Website,* http/www.benedict.com/

[6] Sony Corp. v. Universal City Studios, 464 U.S. 417, 104 (1984).

[7] Shetland Times, Ltd. v. Wills Scot Sess-Case, 1 EIPLR 723 (1996).

[8] D. A. TYSVER & B. BOLIN. (1996). *BitLaw Internet Law*: Linking, http://www.bitlaw.com/internet/linking.html (Jan. 1998).

[9] Princeton University Press, Macmillan Inc., and St. Martin's Press, Inc., v. Michigan Document Services, Inc. and James M. Smith, 1996 FED App. 0357P (6th Cir.).

[10] Ticketmaster Corp. v. Microsoft Corp., No. 97-3055 DDP (C.D. Cal. 1997)

[11] E. MADOFF. *Freedom to Link Under Attack: Web Community in Arms Over Law Suits*, N.Y.L.J. (1997). http:/www.1jx.com/internet/0623link.html (January, 1998).

[12] C. DALZIEL. *Background and summary. Fair use guidelines for educational multimedia: The final document and its implementation*. Ames, IA: Consortium of College and University Media Centers (1997).

[13] California State University, San Bernardino. *Intellectual property policy: Inventions and discoveries*. Document: FAM 575 (Faculty Administration Memorandum of Understanding) (1993).

[14] J. R. GALIN and J. LATCHAW. *Shifting Boundaries of Intellectual Property: Copyright, Intellectual Property, and Publishing.* http://139.182.93.107/hypertch/copyright.htm

[15] K. M. OWEN. *Internet copyright issues for the education community*. Unpublished manuscript. Fargo, ND: Tri-college University (1999).

[16] Consortium of College and University Media Centers, *supra* note 1.

26

Charter Schools

Art Townley

Introduction

The charter school phenomenon that seemed radical only a few years ago is now an accepted part of public education in many parts of the country. Charter schools are a relatively young movement and have been in existence since 1991. In that year, the state of Minnesota approved charter school legislation, and California followed in 1992.[1] From that beginning, thirty-six states and the District of Columbia have approved legislation creating charter schools.[2] Charter schools are public schools, but what sets them apart is their charter. Each school develops a contract with a state or local agency that provides it with public funds for a specified period. Simply put, the charter school is an autonomous, publicly-funded, performance-based school that is free from many of the state and local rules that govern other public schools.[3] In return for this freedom, charter schools are held accountable for student performance and achieving goals established in the charter. If the school's goals are not achieved, the school's charter may be revoked.

The concept is simple but powerful: schools will flourish and student achievement will improve when parents are given choice, and teachers can be more effective when freed from government bureaucracies. Another characteristic of charter schools is the fundamental tenet of public schooling: non-sectarian, publicly-funded, accountable to a public body, nondiscriminatory, and no tuition. Proponents of charter schools include both political conservatives, who view them as a step toward a system in which students would receive vouchers to attend public, private, or parochial schools; and political moderates, who see charters as a way of averting this dramatic step. Both groups believe charter schools can strengthen public education by promoting competition and giving innovators an opportunity to be creative.

Obviously, due to the recency of the charter school movement, there have been few court decisions affecting the status of the charter school movement. These cases are beginning to have an impact and will help establish the boundaries for these schools. State laws govern numerous aspects of charter schools' initial development, including procedures for attaining charter status and the procurement of funds, recruitment of students, and hiring of staff.

Legal Issues

Issues of Constitutionality

The issue concerning constitutionality of charter school legislation was challenged in several states. In *Denver Board v. Booth*, the court stated the State Board of Education did not infringe on the local school district's control of instruction by ordering approval of a charter school application denied by the local district.[4] In this case, the Colorado Supreme Court ruled the process for allowing an appeal to go to the state board for review was constitutional. In California, an appellate court ruled in *Wilson v. State Board of Education* that the Charter Schools Act was constitutional and the state could delegate certain educational functions to the grantees who operate the schools. This delegation does not violate the provision of the state constitution obligating the legislature to provide for a system of common schools.[5] The State Supreme Court in New Jersey held the Charter School Program Act was constitutional as long as the mandate to provide a "thorough and efficient" system of education was satisfied.[6] The court specified that the Commissioner of Education must review applications to see if segregation would occur and must consider the economic impact on the school district. In New York, a district board and individual plaintiffs attempted to enjoin the operation of Roosevelt Children's Academy Charter School which was established by the State University of New York. The court ruled the Charter Schools Act is constitutional and the district lacked capacity to sue other state entities. The court denied an injunction to the individual plaintiffs but said a review of the financial impact on the district was required.[7] A New Jersey court ruled that the Charter School Act was not unconstitutional for failing to require consideration of race in the approval process.[8]

Issues Involving Desegregation

Desegregation issues played an important role in much of the charter school legislation. "To protect school desegregation policies, 11 states...require charter schools to comply with court-ordered school desegregation decrees."[9] *Berry v. School District of City of Benton Harbor* addressed the issue of opening a charter school in a district under a desegregation decree.[10] The court stated that funding would not be approved until sufficient information concerning the racial composition of the school was submitted. The court stated that such a school is under greater obligations and would be authorized only if the racial balance was appropriate. A county school board denied a charter school application in South Carolina because the racial composition did not meet the civil rights requirement.[11] The equal protection issue arose since the school could not deviate more than 10 percent in racial composition from the requirement under the district's voluntary desegregation plan. The court referred the issue to the Attorney General and stated after a review the charter school could reapply. In New Jersey, the court ruled the Commissioner of Education must review the application to see if segregation would result from approving the charter.[12]

Issues of Finance

Some states offer start-up money, but most do not. Once the charter school begins operations, the school receives the regular formula-driven funding based on student enrollment. In some states, schools receive money directly from the state. In other states, charters receive their monies in a "pass through" from local districts. For major capital expenditures, charter schools must independently raise funds because they are ineligible for funds raised through public bond issues. A charter school initially faces large expenses simply because it is a new enterprise. California's Institute for Education Reform estimates that a school will need approximately $300,000 as start-up costs. The Institute developed a hypothetical budget, which includes startup costs. It does not include teacher or classified salaries since these expenses would be part of the operating budget. The budget includes $40,000 for administration, $55,000 for rental and facilities, $45,000 for staff development, $125,000 for instructional materials and equipment, $5,000 for office equipment, and $30,000 for professional services, i.e., legal, assessment consultant, finance and operations, and special needs students.[13]

Issues of Equal Protection

An equal protection claim arose when a district school board denied charter school board members' requests to hold teaching positions within the charter school. The appellate court dismissed a suit by the charter school to enforce the contract between the school and school district since the charter school was a subordinate part of the school district. It remanded the equal protection claim by the board members finding teachers in other charter schools in the district could hold board member positions.[14]

Issues of State Review

The Illinois State Board of Education can reverse a school district's decision to deny a charter to a new school.[15] The court stated the charter must substantially comply with the Charter School Law and must be in the best interests of the students it is designed to serve. The state review must occur within the required time limits. A Pennsylvania court ruled that the State Charter School Appeal Board is the proper administrative agency to review an appeal of a local board's decision to deny a charter.[16] In this case, the appeal board denied the appeal finding that the school made no commitments for enrollment, did not submit a curriculum plan, failed to submit specific school operation information, failed to submit a financial plan, and failed to show compliance with the ADA and IDEA. The court stated the school's failure to comply with the Law warranted the denial.

Issues of State Requirements

Charter schools vary significantly from state to state and even within states. For example, the 1991 Minnesota law specifies that only licensed teachers can apply to local school boards to establish charter schools. In addition, proposals for charter schools must be approved by the department of education. California's charter school legislation does not require charter schools to follow most state regulations for traditional schools. A major reason for this difference is the political climate of the state when charter school legislation was approved. There is a tremendous variation across the states in the degree of autonomy granted to charter schools and in the number of charter schools allowed by the various states.

Prior to 1998, California law limited the number of charter schools to a maximum of 100. In May 1998, the California Legislature approved legislation, which will permit an additional 250 charter schools during the 1998-99 school year and an additional 100 schools in each of the following years. Also, California legislation authorized charter schools to establish a school on an unused public school site at no charge to the charter. The legislation also made it much easier for a sponsoring organization to start a charter school. Effective January 1, 1999, charters could organize as nonprofit corporations with the charter granting entity protected from liability for the charter's operations, and unused district-owned facilities could be used rent free.

Many states require that charter schools provide their curriculum, financial plans, proposed racial composition and compliance with ADA and IDEA for review before a charter will be granted. In

New York, the state required charter school students to take the State Regents Examination. A group of schools converted from schools designated as Twenty-first Century Schools to charter schools. As Twenty-first Century Schools they were exempt from taking the examination for five years. When they converted to charter schools they came under the requirement for students to take the exams. The court ruled they had made a voluntary transfer to charter schools and now must follow the state law.[17] A court ruled that a charter school must submit a new plan for facility use to be reviewed by the local district when the original facility was no longer available and the charter school contracted for a different building.[18]

Issues Involving Contracts

A decision regarding California collective bargaining law ruled that charter schools are exempt from the state's collective bargaining laws and not subject to the Public Employment Relations Board (PERB) jurisdiction. This case involved Washington Elementary School, a California charter school. The school's charter provided that classified (non-teaching) staff would be covered by the district's personnel policies and existing collective bargaining agreements, but that 75 percent of the affected staff could vote to waive them. The classified staff voted unamimously to withdraw from the union. The school administration decided to contract with a private firm for grounds keeping services, which would save the school $25,000 per year. The classified union filed a complaint with PERB over the grounds keeping issue, arguing that the district was obligated to bargain the issue. The school district argued that the school was exempt from collective bargaining and, therefore, that the PERB had no jurisdiction over the case. The court ruled for the school stating, "The Legislature granted charter schools the right to be free from regulatory statutes governing school districts, including the EERA (Educational Employment Relations Act: California's education collective bargaining laws) and the administration of that Act by PERB.[19] This ruling strengthens the legal protection surrounding California charter schools and clarifies their independence from state collective bargaining laws and existing collective bargaining agreements.

Recommendations For Practice

Charters rarely share a single educational philosophy or curriculum focus. There is not a charter model that dictates what to teach, who will teach it, where to locate the school, what hours to operate, how long class periods will run, how best to impart reading skills, etc.

- Each charter seems to have a different approach but there are certain state requirements that must be met.
- Also, there is no definitive evaluation of charter schools demonstrating effectiveness. Some schools are achieving great success, while others are struggling. Still evaluation must be a an important part of the criteria and many times is determined by state requirements.
- Most studies have focused on the characteristics of children attending charter schools rather than academic performance achieved by the students. Charter schools are populated by those who have chosen to be there and who believe in the mission of their chosen school.
- Legislation authorizing charter schools recognizes that another public option for students was necessary since the nation's public schools may not provide the best opportunity for all students. Only time will tell if the charter school movement will meet its promise of providing a successful alternative to the comprehensive public school.

References

[1] U. S. Department of Education. *The State Charter Schools 2000: Fourth-Year Report* at 11. (Jan. 2000).

[2] *Id.*

[3] *See In re* Grant of Charter Sch. Appl., 753 A.2d 687 at 689 (N.J. 2000).

[4] Denver Bd. v. Booth, 984 P.2d 639 (Colo. 1999)

[5] Wilson v. State Bd. of Educ., 89 Cal. Rptr.2d 745 (Ca. App. Ct. 1999).

[6] *In re* Grant of Charter Sch. Appl., 753 A.2d 687 (N.J. 2000).

[7] Board of Educ. v. Board of Trustees, 713 N.Y.S.2d 908 (Sup. 2000).

[8] *In re* Charter Sch. Appeal of Greater Brunswick Charter Sch., 753 A.2d 1155 (N.J. Super. Ct. App. Div. 1999).

[9] P. C. GREEN. *Preventing School Segregation Decrees From Becoming Barriers to Charter School Innovation* 144 EDUC. L. REP. 15.

[10] Berry v. Sch. Dist. of City of Benton Harbor, 56 F. Supp.2d 866 (W.D. Mich. 1999).

[11] Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm., 516 S.E.2d 655 (S.C. 1999).

[12] *In re* Grant of Charter Sch. Appl., 753 A.2d 687 (N.J. 2000).

[13] Institute for Education Reform. California State University, Sacramento, 1998.

[14] Academy of Charter Schs. v. Adams County Sch. Dist., No. 12, 994 P.2d 442 (Colo. Ct. App. 1999).

[15] Board of Educ. of Community Consol. Sch. Dist., No. 59 v. Illinois State Bd. of Educ., WL1701628 (Ill. App. Ct. 2000).

[16] Shenango Valley v. Hermitage Sch. Dist., 756 A.2d 1191 (Pa. Commw. Ct. 2000).

[17] International High Sch.: A Charter Sch. at LaGuardia Community College v. Mills, 715 N.Y.S.2d 490.

[18] Souderton Area Sch. Dist. v. Souderton Charter Sch. Collaborative, WL1879875 (Pa. Commw. Ct. 2000).

[19] E. PREMACK. *Court Confirms California Charter Schools Are Free From Collective Bargaining*. CANEC. (Aug. 23, 1996).

27

Alternative Dispute Resolution Techniques

Steven S. Goldberg

Introduction

Although schools were once managed by principals whose decisions went unchallenged, schools are now regulated by a body of law which requires attention to the rights of students, teachers and school officials. Litigation has had the positive effect of defining and developing rights in many areas including race and gender-based discrimination, discipline, privacy, free speech and the treatment of students with disabilities. Yet, suing is an adversarial process that can undermine the type of community where teachers, parents, administrators and children are free to do their work in an atmosphere of trust and inclusion.[1] After a generation of litigation, principals, often fearful of being sued, feel they are not free to function for fear of offending a parent, superintendent or school board member.[2]

There is a need to bring the education community together, and there is some evidence that using negotiation and mediation may bring about a fair way to settle differences. Principals can promote efficiency by implementing peer and special education mediation programs to settle two of the most time-consuming types of disputes and by implementing dispute systems that can address conflict throughout their school.[3]

Legal Issues

Because they have become dissatisfied with lawsuits, parties to education disputes have begun to consider Alternative Dispute Resolution (ADR) techniques, especially negotiation and mediation. Principals must choose the least costly ADR techniques for the particular dispute that arises in schools, taking into account that the limited finances and the need to diffuse emotion argue in favor of less intrusive ADR forms. Moreover, disputes must be resolved in a timely manner, so that students can be served and educators can be free to do their job.

Negotiation

Negotiation—communicating with another party in order to persuade—is the most widely used form of dispute resolution in schools.[4] It is also the least intrusive, because only the parties seeking an agreement are involved in the process; no outside facilitator or decision-maker need be used. Teachers instinctively negotiate with parents in developing programs for students, sometimes effectively and sometimes not so effectively, sometimes with the child's interest uppermost and sometimes with the teacher's interests uppermost.

In most traditional negotiations in schools, people dig into a position and try to obtain an agreement that they think advances their interests. This form of negotiation is called "positional bargaining," also known as the "give and take" method. One side makes a proposal and the other side responds, usually with the goal of satisfying one's own interests. Sometimes this process results in a solution in which both sides gain something through compromise, but often it fails to produce a "win-win" solution because one side is too intent on gaining at the expense of the other side. In fact, if the conflict is too intense, one side may give in to the other simply to avoid escalation of the conflict.

According to its proponents, traditional negotiation is worthwhile because it keeps third parties, including courts and lawyers, out of school conflicts and allows parties to develop their own solutions. Moreover, the cost is far less than litigation, time is saved, and stress is diminished. Bargaining, in essence, creates a middle ground between a lawsuit and compliance with one party's position. Both the rights of students and the needs of administrators can be discussed, and sometimes both can be accommodated through compromise.

Like the litigation it is trying to avoid, traditional negotiation has its drawbacks in school settings. Negotiation frequently is a win-lose proposition, particularly when the parties have unequal bargaining power. For example; cultural, language, or educational barriers—which are widespread in schools—may impede communication between parents and educators and create unequal status. Perhaps most importantly in an education context, negotiation may result in a settlement that provides fewer rights for students and employees than the law requires.

Principals may find another form of negotiation, known as "Principled Negotiation," useful in their work. Rather than taking positions and sticking to them in a dispute, a principal can take a problem solving approach that tends to fit in a school context. Instead of looking to win, the principal can look to understand the true interests that others have, rather than the positions that they take. In addition, this concept calls for brainstorming options for mutual gain, concentrating on the people rather than the problem, and looking for independent standards that may resolve the dispute. Nevertheless, a principal in negotiating with this model must have a "BATNA or Best Alternative to a Negotiated Agreement," a walking away point after which the administrator's best interests are not served by further negotiating. By using this model, which is hard on the problem and not the people involved, administrators can seek the win-win solution that is so important for building relationships that are necessary to get things done in schools.[5]

Mediation

Perhaps because so many education negotiations have failed to resolve conflict and because adversarial proceedings exact a heavy toll on participants, mediation has been encouraged as an intermediate step in dispute resolution.[6] Essentially, mediation is negotiation facilitated by a neutral person. The focus is on having a trained third party help disputants come to their own resolution of a conflict, not on deciding who is "right." Mediation does not rely on factual presentations, witnesses, or formal rules of evidence. Instead mediators encourage exchanges of information, help parties to understand the others' views and to communicate effectively, stimulate the parties to develop creative solutions, and generate recommended solutions that honor the basic rights of the parties. Mediators have no authority to impose a solution on the parties, and the disputants are free to accept or reject any recommendations from the mediator.

The presence of a mediator changes the dynamics of a negotiation. In education practice, mediation can be useful because it helps parties—parents and school officials—who were previously at an impasse to develop a settlement and avoid litigation. Mediation also can help the parties build a positive continuing relationship, which is necessary for the many years they must interact during the course of a child's educational experience.

There are a number of questions principals need to think about when promoting mediation in education: 1) do only persons who are motivated to settle engage in mediation, and 2) is there really a saving of time and money if substantial staff time is involved? In addition to these questions, principals must be aware that there is some evidence that unsophisticated parents cannot tell the difference between mediation and litigation, because the mediator is deemed to be an authority figure, thereby creating undue deference to the mediator's recommendations. Another consideration is to realize that parties in school disputes, already emotionally burdened and defensive, may be coaxed into mediation with their positions already fixed, thus undermining the prospects for successful mediation. Finally, like negotiation, if mediation compromises basic rights to education, it should not be used. In other words, although mediation may result in a settlement, it does not necessarily provide the type of justice a court decision would command.[7]

Special Education Mediation

In response to landmark lawsuits of the early 1970s, Congress passed the Education for All Handicapped Children Act of 1975. Now known as the Individuals with Disabilities Education Act or "IDEA," the statute requires states to provide due process hearings to any parent who objects to the educational classification, evaluation, program or placement schools offer to special education students.[8] The 1997 IDEA Amendments now require all states to provide a mediation system.[9]

Congress imposed these traditional legal notions of fairness in order to secure parental participation in decision-making from which they had been historically excluded. Moreover, Congress opted for adversarial hearings because it believed that these were the best way to afford justice to both school districts and parents. Imposing a legal procedure on the culture of education, however, may not always be the appropriate way to resolve special education conflicts. Special education is enhanced by cooperative relationships between parents and school officials, and the adversarial system tends to undermine cooperation.[10] Because they have become dissatisfied with lawsuits (as well as with hearings), parties to special education disputes have begun to consider alternative dispute resolution techniques, especially mediation. While lawsuits were necessary to develop and define the rights of students with disabilities over the last generation, using non-adversarial techniques may be useful in most cases that arise.[11]

Peer Mediation

Thousands of school districts have developed peer mediation programs for their students to resolve disputes that arise between and among other students. Students are trained to mediate disputes that arise regarding personal relationships, as well as to reduce violence in the schools.[12] It is up to the students to organize the mediations and to draft settlements for the students who are undertaking the mediation. It is usually possible to obtain training from local lawyers or a neighborhood conflict resolution center.[13]

Dispute Systems Design

A dispute systems design is useful to manage the steady stream of conflicts that arise. Think in terms of "appropriate" dispute resolution. The notion here is that different techniques are best for resolving different disputes. Early negotiation, for example, may be best for resolving most education disagreements, where the goal of most parents is to be heard, and the goal of most school officials is to have a place to learn about parents' needs. The purpose of a model is not to "resolve" conflict, because conflict is at the center of what goes on in schools. It is bound to occur. Consequently, schools need to think in terms of enhancing the capacity of the school district to manage the conflict that is inevitable. There are two guiding principles of dispute systems design that may help principals to develop a foundation for a system that responds to differences in schools: diagnosis and implementation.

First, one must define the problem. The actual parties faced with a conflict must be involved in defining the problems their community (classroom, school, district) faces. Second, determine the scope of the problem: while surface conflicts can be dealt with immediately, the problem must be defined as broadly as possible. Third, commit to a process controlled by the participants. Those who are affected by the process must commit to implementation, including appropriate follow-up efforts. Fourth, link the new process with established decision-making bodies: the process needs the support of authorities such as the court and the school board. Fifth, represent all major interests in the effort for the design to work.

In implementation, designers suggest the following internal framework in order to reduce the costs of disputes and to produce more satisfying and long-lasting solutions. First, provide for early discussion of differences at the building level. Second, have at the building level several trained negotiators for disputes, so that at least one person will be available who is trusted in times of crisis. Third, provide for a multi-step process, so that a dispute that is not resolved at the building level can be resolved at the sub-district level (while at the same time keeping it from escalating). Fourth, give negotiators authority, so that people will feel that dealing with them is worthwhile. Fifth, provide easy access to a neutral intermediary, such as a district-wide ombudsman, who has the authority to get solutions implemented and the skill to encourage continued negotiation about a problem. Sixth, teach students and staff about problem solving skills—how to listen, probe for interests, explore creative options. Seventh, create "loop-backs" to negotiation so that people can be moved from a power approach to a negotiation approach (formal cooling-off periods or bringing in a mediator to facilitate negotiations). Eighth, start with the least intrusive low-cost procedure such as negotiation, before bringing in third parties to mediate, so that those in conflict can retain control of each dispute and its solution.[14]

Recommendations For Practice

- ADR is not a magic bullet. It may be useful; but if it is presented as a cure-all, it will be dismissed as another fad. Indeed, it is not always useful to resolve all disputes through settlement. Its purpose is to get people in schools to realize that there are alternatives to power, litigation and violence.
- ADR is based on cooperation and letting disputants retain control. Techniques cannot be forced on schools by outside experts who come in for brief periods with minimal follow-through. Every effort must be made to retain control of the dispute and its resolution at the building level. This motivates people who are affected by the conflict to participate in implementing the solution.
- Culture, race and gender bias and other authority/power issues must always be avoided, so that all school community members feel free to negotiate.
- Children, teachers and others can teach and be taught conflict resolution skills "across the curriculum." Use teaching materials that encourage students to understand that settling disputes is a useful alternative to violence. Peer mediation—training students in negotiation techniques—is only one part of the whole system.[15]

References

[1] J. HANDLER, LAW AND THE SEARCH FOR COMMUNITY (1990); L. SINGER, SETTLING DISPUTES (1994).

[2] *See generally*, S. S. GOLDBERG & K. LYNCH, *Reconsidering the Legalization of School Reform*, 7 OHIO ST. J. ON DISP. RES. 199 (1992).

[3] S. S. GOLDBERG & D. HUEFNER, *Dispute Resolution in Special Education*, 99 EDUC. L. REP. 703 (1995).

[4] S. GOLDBERG, F. SANDER & N. ROGERS, DISPUTE RESOLUTION, 2d ed. (1992).

[5] R. FISHER, W. URY & B. PATTON, GETTING TO YES, 2d ed. (1991).

[6] C. MOORE, THE MEDIATION PROCESS, 2d ed. (1996). J.FOLBERG & A. TAYLOR, MEDIATION (1984).

[7] *See* O. FISS, *Against Settlement*, 93 YALE L. REV. 1073 (1984).

[8] 20 U.S.C. §§ 1400, *et seq.*; 34 C.F.R. § 300, *et seq.*

[9] 20 U.S.C. § 1415(e).

[10] P. KURILOFF and S. S. GOLDBERG, *Is Mediation a Fair Way to Resolve Special Education Disputes: First Empirical Findings*, 2 HARV. NEGOTIATION L. REV. 201 (1997).

[11] *Id.*

[12] R. COHEN, STUDENTS RESOLVING CONFLICT: PEER MEDIATION IN SCHOOLS (1995); R. BODINE & D. CRAWFORD, THE HANDBOOK OF CONFLICT RESOLUTION EDUCATION (1997); W. KREIDLER, CREATIVE CONFLICT RESOLUTION (1984).

[13] The American Bar Association Section on Dispute Resolution can be contacted about lawyers who are available to train students. Its staff can be reached in Washington, D.C. at 202-331-2607. The Conflict Resolution Education Network has extensive materials relating to peer mediation in the schools. This organization is also in Washington at 202-466-4764.

[14] W. URY, J. BRETT & S. GOLDBERG, GETTING DISPUTES RESOLVED (1988); J. MURRAY, *Designing a Disputing System for Central City and its Schools*, 5 NEGOTIATION J. 365 (1989); C. COSTSANTINO & C. MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS (1996).

[15] A general introduction to the topic of conflict resolution in the schools is L. LANTEIN & J. PATTI, WAGING PEACE IN OUR SCHOOLS (1998).

28

School Finance

Mary F. Hughes

Introduction

Five of the major school finance topics from 1993 to 1999 were school level data, performance-based accountability and financial rewards, school facilities, property taxes, and litigation. The property tax issue has and will continue to have a great influence on schools and school principals due to the direct relationship to school funding. The diversity in school facilities across the nation is well documented; and the constant need for funds for facility maintenance, repairs, and new buildings continues as a problem for school administrators. It has been proposed that if school districts become serious about site-based management, then there will be a great need for school-level data and school-based budgets. By 1997, financial rewards tied to performance-based accountability had been adopted by 14 states. School finance litigation continues to go forward with issues of adequacy and equity; and with the collection of school level data, an influx of intra-district equity cases could be next.

Legal Issues

Property Taxes

Funding for public elementary and secondary education is generated from local, state and federal fiscal sources. In 1990, on an average, the local level provided 46.6 percent of total public school revenue. This percentage ranged from 2.6 percent in Hawaii to 90.2 percent in the District of Columbia.[1] Since 1920, revenue from the local level has decreased from 83.2 percent to 47.4 percent in 1993.[2] The majority of local funds are generated from the property tax and totaled nearly $162 billion in 1992.[3] More and more states are seeing property tax revolt by tax-payers as was seen in California in 1978 with Proposition 13. In 1994, Michigan cut property taxes for school operations nearly 50 percent and increased the sales tax from four to six percent with 100 percent of the additional two percent sales tax dedicated to the School Aid Fund. Sixty percent of the additional sales tax was already dedicated to the School Aid Fund. The major goals of Michigan's school finance reform were to reduce reliance on the property tax as a major source of funding for school districts resulting in a reduction in disparities in fiscal inputs among districts.[4] In 1995, the South Carolina General Appropriations Act of 1995, State Property Tax Relief Fund, "was adopted to eliminate property taxes for school operations on the first $100,000 of an owner-occupied home's value." State funds to compensate for the rollback were approximately $203 million.[5]

Other states that have had property tax limitation issues are Ohio, New York, and Wisconsin. In 1998, an amendment for total abolishment of the property tax in Arkansas was removed from the November ballot, but the property tax limitation issue continued to have a high degree of interest by tax-payers and legislators. The property tax issue continued in importance to public school principals and administrators because of the issues of school funding and school governance. As local level funding decreases, state level funding will have to increase. The major source of local funding has been the property tax.

School Facilities

The major source of funding school building construction and renovations has been the property tax at the local level. The U.S. General Accounting Office estimated that schools nationwide needed to spend about $112 billion to repair or upgrade school buildings into good overall condition.[6] The average school district in America needed about $1.7 million to repair and upgrade schools to good overall condition. Only 16 percent of the reported schools indicated that funding was not needed. In the report, "good" condition means that only routine maintenance or minor repair is required. "Overall" condition includes both physical condition and the ability of the schools to meet the functional requirements of instructional programs.[7] On an average, a new elementary school costs about $6 million, and the average secondary school costs about $15 million to construct.[8]

The tradition of local responsibility for financing school sites, buildings, equipment, and other capital costs is still strongly entrenched in many states. In 1993-94, the following fourteen states provided no funding for school facilities: Arkansas, Idaho, Illinois, Iowa, Louisiana, Missouri, Montana, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Virginia, and Wyoming. Michigan provided no funding in 1994-95, and Nebraska provided less than one million dollars in 1993-94.[9] Thirty-seven states provided some state funding for capital projects, including states that address capital outlay through their basic support program.

The ability of a school district to fund school buildings at the local level is directly related to the local fiscal resources available to that district. In most states, the only fiscal resource available to school districts is the property tax. Therefore, the most commonly used measure of district wealth is a district's equalized assessed property valuation. In 1993-94, twenty-four states measured district wealth by assessed property valuation; nine states included personal income with assessed property valuation; nine states included other revenue sources that did not include personal income; and five states included assessed property, personal income, plus other revenue sources.[10]

The looming crisis in facilities underscores the importance of fiscal planning, particularly since school buildings represent the single largest investment in a school district. Under such conditions, it is critically important for administrators to have a good understanding of the issues and operation of education facilities.[11] Two issues were submitted by the plaintiffs in the 1998 school facilities funding litigation in Idaho: 1) is there a constitutional requirement that the legislature provide capital facilities and capital assets funding for education in Idaho; and 2) is the present system of funding capital expenditures unconstitutional in the sense that there is no equalization of funding through the foundation formula for capital expenditure needs.[12]

Also, in 1998, the Supreme Court of Arizona noted that legislatively-established standards for adequate capital facilities are a core component of a general and uniform public school financing system. The question in the 1998 case was whether the state financing system had met the previously established state constitutional requirements. The court stated that: 1) the state must establish minimum adequate facility standards and provide funding to ensure that no district falls below them; and 2) the funding mechanism chosen by the state must not itself cause substantial disparities between districts.[13]

Performance-Based Accountability

Policy-makers throughout the nation are exploring whether a portion of state education funds should be allocated to schools as financial rewards for improvements in student achievement and other performance indicators. Team-based rewards for school improvements currently called for in fourteen states' statutes represent one form of performance-based school finance.[14] The fourteen states are: Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Maryland, New Jersey, New Mexico, North Carolina, Pennsylvania, South Carolina, Texas, and Washington. These states also direct assistance for or impose sanctions on low-performing schools through accreditation or accountability systems.[15]

School-Level Data

Most financial reporting of the 84,000 public schools in the U.S. is still contained at the school district level. A few states have accounting systems that extend to the school level. The effort to collect expanded school-level resource and expenditure data has been undertaken by the National Center for Education Statistics (NCES) in response to the demand of education finance researchers for improved data.[16] The following six policy issues are driving the demand for school-level resource data: resource allocation and productivity (What is the relationship between school expenditures and student outcomes?); costs and effects of policy initiatives (How does Initiative X affect school staffing patterns and expenditures?); equity and adequacy (How much variation is there in per-pupil expenditures among schools?); school-based management (What data are needed for school management decisions?); accountability (How do resource allocations compare in similar schools?); and Congressional interests and public inquiries (How much is spent on administrative expenditures at the school site and the central office?).[17]

New Adequacy in Education Finance Litigation

Since 1989, supreme courts in twenty-one states have issued rulings on the constitutionality of their school finance systems. In eleven states, the high court has found the finance system unconstitutional. Currently, litigation is active in a majority of states and concern over the threat of a possible court challenge affects most of the remaining states.[18] The majority of the decisions in these courts have examined the state finance system to see if it is adequate and provides sufficient revenue for all students to obtain a certain level or standard of education that is considered constitutionally required.[19] Where state finance systems have been invalidated by high courts, adequacy is defined in the context of the information age and global economy and in what dollars buy—including teachers, materials, curriculum, facilities, budget flexibility, and opportunity.[20] States where the finance system was overturned were: Arizona (1994), Kentucky (1989), Massachussetts (1993), Montana

(1989, 1990), New Hampshire, New Jersey (1997), Ohio (1997), Tennessee (1993), Texas (1995), Vermont (1997), and Wyoming (1995).

Recommendations for Practice

The school finance issues addressed have several legal ramifications for school principals. Property tax limitations, school facility funding, accountability, school-site budgets, intra-school district equity, and "what dollars buy" all have accompanying legal issues, either in the form of state statutes, court decisions or possible litigation. The issues underscore the importance of public school principals being informed. Recommendations for practice include:

- know the property tax laws and issues in your state that are related to school funding and understand school facility funding issues in your state;
- encourage the collection of school-level data; and
- be prepared for performance-based accountability and understand the meaning of adequacy as interpreted by the courts.

References

[1] U.S. Department of Education, National Center for Education Statistics, DIGEST OF EDUCATION STATISTICS 1992. Washington, D.C. : National Center for Education Statistics (1992), 151 in THOMPSON, WOOD & HONEYMAN, FISCAL LEADERSHIP FOR SCHOOLS. White Plains, NY: Longman Publishing Group, pp. 171-172.

[2] U. S. Department of Education, National Center for Education Statistics, *The Condition of Education 1995*. Washington, D.C.: National Center for Education Statistics (1995) in SWANSON & KING, SCHOOL FINANCE: ITS ECONOMICS AND POLOITICS, 2d edition, White Plains, NY: Longman Publishing Group, 11.

[3] *Id*. at 141.

[4] H. PRINCE, *Michigan's School Finance Reform: Initial Pupil-Equity Results*, J. EDUC. FINANCE 22 (1997): 394-409; and ADDONIZIO, KEARNEY and PRINCE, *Michigan's High Wire Act*, J. EDUC. FINANCE 20 (1995): 235-269.

[5] J. M. GARRIS and E. COHN, *Combining Efficiency and Equity: A New Funding Approach for Public Education*, J. EDUC. FINANCE 22 (1996): 114-134.

[6] United States General Accounting Office, *School Facilities: America's Schools Report Differing Conditions* (Washington, D.C.:

United States General Accounting Office, Health, Education, and Human Services Division, GAO/HEHS-96-103, 1996), p. 4.

[7] *Id*. at 1.

[8] *Id*. at 3.

[9] S. D. GOLD, D. M. SMITH, S. B. LAWTON, eds, PUBLIC SCHOOL FINANCE PROGRAMS OF THE UNITED STATES AND CANADA, 1993-94. Albany, NY: The Center for the Study of the States (1995), p. 35.

[10] *Id*., Vol. 1, at 27.

[11] THOMPSON, WOOD, HONEYMAN, *Fiscal Leadership for Schools*, p. 550.

[12] Idaho Schs. for Equal Educational Opportunity v. The State of Idaho, 1998 WL 905333 (Idaho, 1998)

[13] Hull v Albrecht, 960 P.2d 634 (Ariz. 1998)

[14] R. A. KING and J. K. MATHERS, *Improving Schools Through Performance-Based Accountability and Financial Rewards*, J. EDUC. FINANCE 22 (1997), p. 147.

[15] *Id*. at 150.

[16] J. B. ISAACS, M. S. GARET, and S. P. BROUGHMAN, *A Proposal for Collecting School-Level Resource Data on the Schools and Staffing Survey*, in DEVELOPMENTS IN SCHOOL FINANCE 1997, W. J. FOWLER, JR., ed., Washington, D.C. : U.S. Department of Education, Office of Educational Research and Improvement, National Center for Education Statistics (1997), p. 172.

[17] *Id*. at 173.

[18] D. A. VERSTEGEN, *Judicial Analysis During the New Wave of School Finance Litigation: The New Adequacy in Education*, J. EDUC. FINANCE 24 (1998), pp. 51-52.

[19] *Id*. at 54.

[20] *Id*. at 56, 57.

29

Affirmative Action

Jay Cummings and Bill Camp

Introduction

There is increasing dissatisfaction with current affirmative action plans across the country. At the focus of this dissatisfaction is the admission procedures to this country's colleges and universities as seen recently in California,[1] Texas,[2] and Washington.[3] Many have pointed to the misuse of affirmative action in that it may not be narrowly tailored or serve a compelling governmental interest. This dissatisfaction though does not mean an end to all affirmative action programs. School officials must design affirmative action plans to meet requirements of Title VI, Title VII and the Equal Protection Clause. Under Title VII, the employer must demonstrate a legitimate but nondiscriminatory reason for its actions while under an equal protection test, they must demonstrate a compelling state interest for the action.

Affirmative action is a voluntary preference plan in hiring or student selection adopted by a school district or university in response to a statistical disparity in race or gender or in response to past discrimination. These plans include policies and programs designed to overcome inequities suffered by minorities and women. The programs are designed to increase employment opportunities and apply to public and private employers which receive monies from the federal government. The plans must be temporary in nature and designed to terminate upon successful integration of workers or students. In *United Steelworkers of America v. Weber*,[4] the court stated that the affirmative action plan cannot trammel the rights of nonminority employees and cannot stigmatize nonminority employees. These voluntary plans will be carefully scrutinized; and they must be justified by a compelling governmental interest and be developed to overcome historic patterns of discrimination.

When combined, the legal issues associated with affirmative action potentialities in employment and admissions procedures are increasingly complex, vary by circuits, and need review. The shifting legal landscape has yielded some contentions and primary practices that must be understood and applied in narrowly-tailored processes in schools, colleges, and universities.

Legal Issues

Employment

In *Wygant v. Jackson Board of Education,*[5] the United States Supreme Court found that hiring goals favorable to minorities were acceptable. In this case, the district developed a layoff plan that retained minority teachers with less seniority than nonminority teachers. The district stated that these teachers served as important role models for minority students. The Court stated that clear and convincing evidence must be demonstrated that the district had engaged in past racial discrimination. The Court stated that layoff procedures favoring minority teachers was too intrusive and drastic to survive a challenge under the Equal Protection Clause. In this case, the Court struck down the role model theory in determining retention of teachers and determined there is a difference in plans for hiring versus plans for retention. The Court ruled that the decision must be justified by a "compelling government interest" and "narrowly tailored to achieve that goal." The Court stated that "denial of a future employment opportunity is not as intrusive as loss of an existing job."[6]

In *Adarand v. Pena,* the Court repealed race-based preferences in state contracts and, thus, impacted affirmative action policies in other contexts.[7] The court found race-based governmental action was suspect. Race-based decision-making could be used to address "both the practice and lingering effects of discrimination."[8] The Court also struck down "set-asides" for minority business enterprises. In *City of Richmond v. Croson,* the court found no evidence of discrimination and the affirmative plan was not remedial. The Court stated the policy had no logical stopping point and, thus, was not narrowly tailored.[9]

In *Taxman v. Bd. Of Educ. Of the Township of Piscataway,*[10] the court reviewed a challenge under Title VII and again stated that affirmative action plans were permissible under Title VII that do not infringe on the rights of nonminority teachers. In this case, the district implemented an affirmative action plan that did not demonstrate a remedial purpose nor were minority teachers under-represented in the district's faculty. When a teacher with the same seniority rights as a minority teacher was laid off, the court ruled that the district's affirmative action plan to create a more racially diverse educational environment violated Title VII. The purpose of

Title VII is to eliminate discrimination and not to promote diversity. Since the decision was based on race and was not remedial, the Third Circuit ruled the decision was not justified. This case was settled out of court in January 1998 before it could be reviewed by the Supreme Court. The settlement of the case left the decision intact for the Third Circuit and again demonstrated that the courts view the layoff of individuals as an intrusive step that requires a compelling reason.[11]

In *Johnson v. Transportation Agency, Santa Clara County*,[12] the court reviewed an example in which a female was promoted versus a more highly qualified male. The court upheld the affirmative action plan and promotion due to a "manifest imbalance" demonstrating under-representation of women in the job category. The court noted that gender was only one basis for the hiring decision. In *Pivirrotto v. Innovative Systems, Inc.*,[13] a female director was fired and a male employee assumed her duties. She claimed she was fired because she was a woman. Though the court determined the company had a legitimate business reason for the action, the case showed that a plaintiff does not have to demonstrate that she was replaced with someone outside the protected class to show a *prima facie* case of discrimination. The court examines whether the person has been treated less favorably than similarly-situated employees due to race or gender.

Postsecondary Admissions

In *Regents of the University of California v. Bakke*,[14] the Court held that the special admission program at University of California-Davis Medical School, which considered applicants from designated minority groups (African Americans, Latinos, Asians, and American Indians) for 16 of 100 available places, violated the non-discriminatory language of Title VI of the 1964 Civil Rights Act. Despite having higher numerical scores than some special admissions applicants admitted to the medical school, Alan Bakke was denied admission. Citing the principle of individual justice, the Court stressed that the Equal Protection Clause of the Fourteenth Amendment guarantees the personal right of an individual to be judged on the basis of worth and merit and not on the basis of class membership.[15] The court decision disallowed the use of quotas and held that the admission system was quota driven. While permitting the use of race as a factor in admission programs, the Court stressed that race cannot be the sole decision factor.

Two higher education cases with precedent-setting potential recently addressed race-conscious admissions policies in *Gratz v.*

Bollinger[16] and *Smith v. University of Washington Law School.*[17] Officials of both universities acknowledged the use of race as one factor in the admissions process, underscoring the permissive language under *Bakke*. The University of Michigan denied admission to two white applicants who alleged that undergraduate admissions employed lower academic standards for minority applicants than for white applicants. The court ruled that the university did not violate the equal protection rights of the plaintiffs for admission to the College of Literature, Science, and the Arts. Granting minority candidates 20 points under the scoring system to determine admissions did not result in a fixed number of minority students being accepted. The court noted that points were also awarded for other factors such as geographic location, socioeconomic status, and an excellent application essay.[18] The lawsuit against the University of Washington Law School alleged that the school rejected white applicants to accommodate less-qualified minority applicants. The Washington court upheld the University of Washington's admission policy, noting that a properly designed and operated race-conscious admissions program does not violate Title VII or the Equal Protection Clause. The court noted that Justice Powell's opinion in the *Bakke* case described the law in the university admission process, and this opinion has not been overturned. The Ninth Circuit upheld this decision but noted that the passage of Initiative Measure 200 in Washington precludes the granting of preferential treatment to any individual on the basis of race.[19]

However, in *Hopwood v. Texas*,[20] the Fifth Circuit reached a different conclusion, stating that the use of race is not a legitimate consideration in admissions to institutions of higher education. Since the appellate court in *Hopwood* rejected diversity as a compelling interest, it may have fueled an anti-affirmative action attitude amongst some admissions officials. The legal grounds for affirmative action precedence in the Fifth Circuit did not bind the courts in Michigan and Washington and, thus, the decisions have reached different conclusions. The vestiges of past racial discrimination practices in university admissions and the society seem to be diminishing as reconceptualized opinions about preferential treatment are taking hold in the courts. The use of diversity or race, which were permissible in *Bakke*, are now being considered impermissible in *Hopwood* based on the denial of diversity or race as the standard for a compelling governmental interest. These developments turn on the notion of transforming educational policies related to equal education opportunity and equity from a civil rights perspective. A Supreme Court ruling will eventually define this area.

A second case in Texas, *Lesage v. State of Texas*,[21] offered the opportunity, as the Supreme Court reviewed this case. Francois Daniel Lesage was an African immigrant of Caucasian descent who applied for admission to the doctoral program in counseling psychology at the University of Texas at Austin and was denied. His suit alleged that the university relied on race as a selection variable and as a consequence bestowed preferential status on African-American and Hispanic applicants. The district court granted the state's motion for summary judgment based on its contention that Lesage would have been denied admission regardless of the use of racial preferences in admissions and dismissed the case. The Fifth Circuit held in the appeal that Lesage had suffered an implied injury because the state employed a racially-discriminating counseling psychology admissions process and reversed the judgment of the district court.[22] The Supreme Court reversed the decision and granted summary judgment to the university. The Court cited its own precedent and stated that even when an impermissible criterion has been used, the government entity can avoid liability by demonstrating that it would have made the same decision if the forbidden consideration were absent.[23] The decision allowed the *Hopwood* decision to stand.

The University of Georgia used an admissions process which relies on race and gender criteria in its selection process. A federal court found the process violated Title VI by granting minority applicants additional points under a system which relies on total points for decisions; and the university violated Title IX by giving additional points to male applicants.[24] The court required the university to admit the students but did not award damages for emotional distress. The court did award relief for excess costs of attending other institutions.

In the wake of *Hopwood*, Texas and Florida have created systems of postsecondary education access that permit students graduating in the top 10 percent of their class to be automatically admitted to their state's public universities. While the initial policy implementation has resulted in modest increases in Texas public universities for Hispanics and African American students, critics underscore the lack of a verifiable connection between high school class rank and higher education success. They indicate the range of variations between class rank in an exemplary high school and a low performing high school as examples. Still, if race, gender, and diversity are disallowed as factors that meet the constitutional muster of equal protection or prohibited by Title VI, Title VII, and Title IX; then universities will be hard pressed to find workable solutions that provide equal access in admissions and equal success in graduations for diverse student populations in their public universities.

School Admissions

In *Wessman v. Gittens*,[25] the appellate court held that the admissions policy of the Boston Latin School violated the equal protection rights of Sarah P. Wessman, a white applicant who was not admitted. Fifty percent of the available admissions for the school's entering class were determined by composite score rank. The remaining fifty percent of admissions were determined on the basis of a formula that included race as a factor. From 1974 until 1987, the Boston Public Schools were under federal desegregation court. In 1987, the First Circuit held that student assignment had eliminated segregation.[26] The admission policy which was designed to foster diversity in the student population at the Boston Latin School resulted in the court ruling that student diversity was not a compelling government interest that justified a race-based admissions policy. The First Circuit reversed the judgment of the district court which had upheld the school's admission policy as a compelling state interest.[27] The appellate court ruled that Sarah Wessman was entitled to be admitted to the Boston Latin School. Since the Boston Public Schools had gained unitary status from the federal court in 1987, the ability to use race as a compelling governmental interest had been eliminated as a compliance instrument to foster desegregation. The role model theory and under-representation were rejected in this case. While racial diversity was not struck down, it was not justified in this instance.

A federal court in Maryland ruled that a non-remedial policy considering race as a sole factor in allowing transfers to magnet schools denied equal protection, even though whites and non-whites were not singled out for different treatment.[28] Even if the court assumed diversity was a compelling governmental interest, the transfer policy was not narrowly tailored to achieve diversity. The court viewed the policy as racial balancing with the district reviewing a diversity profile for each school which was adjusted each year.

A federal court in Michigan stated that districts are not required to make year-by-year adjustments to the racial compositions of student bodies once the affirmative duty to desegregate has been accomplished.[29] As long as school authorities or some other governmental agency does not attempt to fix or alter demographic patterns, further court intervention would not be required. This decision would indicate that districts that have reached unitary status should be wary of taking affirmative steps in altering their admissions criteria. In *Belk v. Charlotte-Mecklenberg Board of Education,*[30] Section 1983 action was taken when a student was denied admission to a magnet school and desegregation plaintiffs moved to reactivate the desegregation case. The federal court ruled that the system had achieved unitary status and the magnet school program was unconstitutional. The Fourth Circuit ruled that the district had not achieved unitary status in terms of student assignments and facilities or in terms of transportation and student achievement since these areas were entwined with the former considerations. Since the race-conscious assignment policy did not violate the desegregation order, the magnet program working under this plan could not be challenged as violating equal protection.

In *Hunter ex. rel. Brandt v. Regents of University of California,*[31] the Corrine A. Seeds University Elementary School (UES) operated as a research laboratory by UCLA's Graduate School of Education and Information Studies. The older daughter of Richard Hunter and Gina Brandt was admitted to UES through the admissions policy. In 1995, a year after the older daughter Cia graduated, they attempted to enroll their younger daughter, Keeley. When Keeley was not selected to be admitted, the parents sued the Regents of the University of California under Title VI of the Civil Rights Act of 1964 challenging the constitutionality of the admissions process. The United States District Court for the Central District of California[32] entered judgment for the defendants and the parents of Keeley appealed. The Ninth Circuit held in affirming the decision that: the state's interest in operating a research-oriented elementary school dedicated to improving the quality of education in urban public schools was a compelling state interest, and the use of race and ethnicity as a factor in admissions met the state's interest in providing effective education.[33] The narrowly-tailored purpose of UES satisfied the Equal Protection Clause of the Fourteenth Amendment with a compelling state interest in remedying past discrimination and improving the quality of public urban education.

In *Boston's Children First v. City of Boston,*[34] the plaintiffs challenged the constitutionality of the Boston Public School's use of its student assignment plan, the Controlled Student Assignment Plan. In 1985, the First Circuit required the Boston School Committee to maintain specific racial percentages in the city's schools through student assignments. In 1987, the First Circuit vacated the orders addressing the student assignment process. However, a permanent injunction remained in place, enjoining the Boston School Committee from creating, promoting, or maintaining racial segregation in any school or facility in the Boston Public Schools.

On March 10, 1999, the parents of John O'Toole, Jr., were informed that his six choices for kindergarten had been denied, and he would be placed on a waiting list with other unassigned students. On June 28, 1999, Boston's Children First joined the plaintiff in filing a complaint. The plaintiffs argued that the violation of equal protection rights under the Fourteenth Amendment constituted irreparable harm and sought a preliminary injunction. The district court held that the record was insufficient to predict whether the plaintiffs were likely to prevail on merits and hardship, and the motion was denied. Because of Boston's Children First's unreasonable delay in bringing the suit, the court based its decision on "Laches," which bars assertion of a claim where the party's delay was unreasonable and resulted in prejudice to the opposing party in defending a claim. If successful, the preliminary injunction would have caused a major disruption in opening of the Boston Public Schools and the assignment of students to campuses in the school district. On July 14, 1999, approximately three weeks after the filing of the plaintiff's complaint, the Boston School Committee voted 5-2 to change the student assignment plan by removing race as a factor starting in school year 2000-2001.

The Fourth Circuit ruled in September 1999 that the use of a weighted lottery to create a diverse student population violated the Equal Protection Clause. In *Tuttle v. Arlington County School Board*,[35] the district weighted selection of students to enter the Arlington Traditional School to match the district population and allow minority groups an increased chance of selection. The policy was not developed to remedy past discrimination, but the court deferred stating diversity could be a compelling interest. The court then found that the policy did not have a stated ending date, favored minority applicants, and burdened other groups. The policy was found unconstitutional since it was not narrowly tailored.

The clear signal to campus and school district leaders from the *Hopwood*, *Lesage*, *Wessman* and *Tuttle* court cases is that the best admissions policy is one that is race neutral, contains multiple criteria, and is narrowly tailored. In the rulings, the admirable intent of creating a student population rich in diversity was rejected equally on the rationale that it can result in racial discrimination, thereby not meeting the standard of a compelling governmental interest, as well as violating the Equal Protection Clause of the Fourteenth Amendment.

While the need to combat years of discrimination against African-Americans, Latinos, and Asian students in school admissions is apparent, the effect of disparate treatment and disparate impact has not influenced the more conservative rulings of the courts since race was permitted as one factor to be considered permissible in *Bakke*. These precedent-setting rulings and the response to *Hopwood* by officials at the University of Texas led to a great deal of tension between the state's attorney general, university officials, and representatives of the majority of the ethnic minority public school student population. Although, the decision to admit based on class rank in the top 10 percent of each high school graduation class was less than ingenious, the initial result eased the tensions somewhat. What remains is a tremendous opportunity for the crafting of admissions policies that satisfy the often contradictory public values of quality, efficiency, equity, and choice in educational options.

Recommendations for Practice

- Affirmative action procedures must be temporary in nature and narrowly tailored to meet the objective of the plan. The program should terminate on successful integration of workers or students.
- In employment, the governmental entity must recognize that the courts view the hiring process and the retention process differently.
- The appellate courts in the First and Fifth Circuits held that equal protection standards of the Fourteenth Amendment applied to admissions policies in public schools and public state universities respectively. School administrators within the jurisdiction of these courts cannot use race as a factor in designing admissions policies.
- School districts under federal court orders to desegregate may use race in designing and implementing admissions policies as long as they are narrowly tailored
- Admissions policies that are built on a race-neutral basis and multiple criteria that can be applied fairly and equitably constitute a proven policy development direction. In developing race-neutral criteria for public school and public state university admissions policies, the use of class rank as a criterion instead of race may prove instructive.
- If the purpose of a public school's admissions process is narrowly tailored to serve the purpose of a state's compelling interest in improving the quality of education and remedying past discrimination, the use of race or ethnicity can be used as a factor.
- School administrators should review and update admissions and student assignment plans, using race as a factor, that

were designed to remedy past discrimination in school districts formerly under desegregation court orders.

References

[1] Governor Wilson ordered an end to affirmative action programs in the University of California System and voters followed with Proposition 209.

[2] Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) *cert. denied*, 518 U.S. 1033 (1996).

[3] Initiative 200 which prohibited governmental entities from engaging in affirmative action programs.

[4] United Steelworkers of America v. Weber, 443 U.S. 193 (1079)

[5] Wygant v. Jackson Bd. of Educ., 476 U. S. 267 (1986)

[6] *Id.*

[7] Adarand v. Pena, 515 U.S. 200 (1995).

[8] *Id* at 235.

[9] City of Richmond v. Crosson, 488 U.S. 469 (1989).

[10] Taxman v. Board of Educ. of Township of Piscataway, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117 (1997), *cert. dismissed*, 522 U.S. 1010 (1997).

[11] *Id.*

[12] Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987).

[13] Pivirotto v. Innovative Systems, Inc., 191 F.3d 344 (3d Cir. 1999).

[14] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[15] *Id.*

[16] Gratz v. Bollinger, 183 F.R.D. 209 (E.D. Mich. 1998).

[17] Smith v. University of Washington Law Sch., No. 99-35348 (9th Cir. Dec. 4, 2000).

[18] *Pivirotto*, 191 F.3d 344 (3d Cir. 1999).

[19] *Bakke*, 438 U.S. 265 (1978).

[20] Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

[21] Lesage v. State of Texas 158 F.3d 213 (5th Cir. 1999).

[22] *Id.*

[23] Texas v. Lesage, No. 98-1111 (U.S. Nov. 29, 1999).

[24] Johnson v. Board of Regents of University System, 106 F. Supp.2d 1362 (S.D. Ga. 2000).

[25] Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998).

[26] *Id.*

[27] *Id.*

[28] Eisenberg *ex. rel* Eisenberg v. Montgomery County Public Schools, 197 F.3d 123 (Md. 1999).

[29] Davis v. School Dist. of City of Pontiac, 95 F. Supp.2d 688 (E.D. Mich 2000).

[30] Belk v. Charlotte-Mecklenburg Bd. of Educ., 233 F.3d 232 (4th Cir. 2000).

[31] Hunter *ex. rel*. v. Regents of the University of California, 190 F.3d 1061 (9th Cir 1999).

[32] Hunter *ex. rel*. v. Regents of the University of California, 971 F. Supp.2d 1316 (1999).

[33] *Wessmann*, 160 F.3d 790 (1st Cir. 1998).

[34] Boston's Children First v. City of Boston, 62 F. Supp.2d 247 (D. Mass. 1999).

[35] Tuttle v. Arlington County Pub. Sch. Bd., 189 F.3d 431 (4th Cir 1999).

30

Desegregation in the 1990s

Charles J. Russo and W. Joseph Scholler, III

Introduction

Following an active twenty-five year period during which the Supreme Court resolved more than thirty cases involving school desegregation,[1] the 1980s developed into a decade of stagnation during which it only addressed two relatively minor cases on their merits.[2] However, the 1990s opened on a promising note for proponents of school desegregation after it appeared that, for all intents and purposes, the Supreme Court had washed its hands of disputes involving school desegregation. Then, well into the fourth year of William Rehnquist's term as Chief Justice, the Court agreed to hear a case on school desegregation. In *Missouri v. Jenkins*,[3] a bitterly divided Court surprised many of its watchers in upholding the authority of federal judges to increase taxes to pay for the cost of desegregating the public schools in Kansas City. Yet, the ray of hope was short lived since supporters of desegregation in K-12 settings lost in the three remaining cases that the Court would address, *Board of Education of the Oklahoma City Public Schools v. Dowell*,[4] *Freeman v. Pitts*,[5] and *Missouri v. Jenkins II*, [6] throughout the remainder of the decade.

Clearly, there has been progress in the more than forty-five years since the Supreme Court struck down segregation in public schools in *Brown v. Board of Education of Topeka*.[7] Yet, much work remains to be done. In fact, more than 200 school systems nationwide continue to operate under court-ordered desegregation plans. In light of the apparent shift away from desegregation as a major concern for the Supreme Court during the 1990s, this chapter is divided into two main sections. The first part reviews the four Supreme Court cases on desegregation that it resolved. The second section reviews selected lower federal court decisions to give a flavor of where the judiciary has gone in this important, but seemingly neglected area. The conclusion briefly reflects on the status of school desegregation.

Legal Issues

Supreme Court Cases

Missouri v. Jenkins [8] was more concerned with the authority of the federal judiciary to impose a tax increase to fund a remedy in a formerly dual system than it was with the substantive aspects of school desegregation. As part of a then thirteen-year court battle, the state of Missouri and the Kansas City Public School District were found to have maintained a segregated system. However, since the state constitution placed a cap on property tax increases, a federal trial court imposed a tax increase to pay for implementing a desegregation order. In *Jenkins* the Court that was otherwise becoming increasingly conservative, surprisingly affirmed the authority of federal judges to increase taxes to pay for the cost of desegregating the public schools in Kansas City. Yet, the extension of judicial power in *Jenkins* set the stage for the cases' return to the high Court later in the decade in a dispute over whether there should be limits on funding a desegregation remedy.

The next two cases examined substantive issues in school desegregation. *Board of Education of the Oklahoma City Public Schools v. Dowell* [9] addressed the appropriate standards for determining whether a formerly segregated school system had achieved unitary status. In reversing the Tenth Circuit, the Court dissolved the desegregation order that had been in place since 1972. The Court reasoned that since desegregation orders were not meant to operate in perpetuity, it was necessary to consider whether a district has complied in good faith with the decree, and whether the vestiges of past discrimination had been eliminated to the extent practicable. Further, the Court ruled that in reaching its judgment, a lower court should not view a board's adoption of a given plan as a breach of good faith, even if it had been technically flawed when the plan was accepted in reliance on the express language of a court order which found that the system had achieved unitary status. Finally, in considering whether the vestiges of segregation were eradicated, the Court continued to rely on the principles enunciated in *Green v. County Sch. Bd. of New Kent County*[10] almost twenty five years earlier.

Freeman v. Pitts[11] considered whether judicial supervision of a desegregation order can be terminated incrementally before full compliance has been achieved. After a federal trial court in Georgia, relying on the *Green* factors, relinquished its control incrementally, the Eleventh Circuit reversed and reinstated the entire plan. The Supreme Court, in turn, reversed. The Court held that a federal judge has the authority to relinquish supervision and control over a school district in stages while retaining jurisdiction, as long as the court is satisfied that the district has made a good faith commitment to comply with the dictates of its order.

In *Missouri v. Jenkins*,[12] the Court revisited the on-going litigation in Kansas City. This time, in a ruling spearheaded by the dissent in the earlier suit between the parties, a bitterly divided Court reversed an earlier judgment in favor of the plaintiffs and signaled a further retrenchment in the struggle to end racial segregation in the schools. In this, the second action between the parties to reach the Court on its merits,[13] the majority noted that a federal trial court in Missouri exceeded the bounds of its broad discretion in mandating a costly desegregation remedy. The trial court had ordered the State to pay for both across-the-board salary increases for virtually all personnel and the quality education programs in Kansas City Missouri School District because student achievement levels were still at or below national norms at many grade levels. Even though the Court stopped short of dismantling the desegregation program in Kansas City, *Jenkins II* is noteworthy as its most recent pronouncement on desegregation.

Lower Court Cases

During the 1990's the lower federal courts considered a variety of issues arising in conjunction with desegregation plans and other racial classifications in America's primary and secondary schools. Based on a 1998 report from the Civil Rights Division of the Office of the Assistant Attorney General of the United States, there are still "more than 400 school districts currently covered by desegregation orders in over 200 desegregation cases in which the United States is a party."[14] Among the issues lies the important question of whether a school district has satisfied its desegregation plan to the extent that it can be declared unitary.

Determination of Unitary Status

A unitary school district is one that has been judicially declared not to be segregated.[15] Several cases have addressed the factors[16] to be considered when evaluating whether a judicially declared segregated school system has achieved unitary status. For example, the Eleventh Circuit affirmed that a school district in Mississippi achieved unitary status where the board of education proved that any remaining racial imbalances in its schools were the result of demographic changes.[17] The court asserted that the district achieved unitary status because it eliminated the vestiges of *de jure*[18] segregation to the extent practicable through a good faith commitment to and compliance with the desegregation plan. Similarly, a federal trial court in Florida ended its twenty-seven years of jurisdiction over a district because it was convinced that school officials had done all that they could to eliminate a dual system of education.[19]

In Texas, a federal trial court was satisfied that a school district achieved unitary status with regard to student assignments, despite an increase in the number of single race schools and primarily minority schools since its initial desegregation decree in 1971.[20] The court decided that there were no further reasonable measures that could have been taken to achieve racial balance where the district implemented several remedial measures such as redrawing attendance zones, implementing majority to minority transfer policies, creating magnet schools, allowing curriculum transfers and developing an honors program. Even though the court pointed out that the school system had achieved unitary status, it retained jurisdiction over the case for a three-year monitoring period.

A federal trial court in Missouri was of the opinion that the public school system in Kansas City achieved unitary status because it complied with all areas of the desegregation plan.[21] The court was satisfied that the district improved student attendance, raised the level of quality in its extracurricular activities, improved the racial balance among its faculty and the staff, and enhanced the racial equity in its facilities and transportation. Similarly, the federal trial court in Colorado wrote that Denver achieved unitary status because it eliminated the vestiges of past discrimination to the extent practicable, despite existing racial and ethnic differences in program participation, test scores, and discipline.[22] However, a federal trial court in South Carolina was not satisfied with a district's progress under its desegregation plan, and it ordered the implementation of a magnet program in a historically black high school to further desegregate the system.[23] The Third Circuit was satisfied that a cross-district remedial plan had achieved unitary status despite performance disparities where school officials provided evidence that the disparities were caused by socioeconomic factors, not *de jure* segregation.[24] This ruling ended four decades of judicial supervision in Northern New Castle County, Delaware.

Non-compliance with a Desegregation Plan

A federal trial court in New York explained how to remedy a situation in the long-running dispute in Yonkers where school district officials and others failed to comply adequately with a desegregation plan. The court discerned a strong preponderance of evidence demonstrating that vestiges of segregation remained in the public school system and that many of the steps taken to address segregation were inadequate. Commenting that the state was also responsible for eliminating segregation, the court devised a formula designating financial liability to both the state and the local district as an appropriate remedy.[25]

Student Admission and Transfer

The use of racial classifications in admission or transfer decisions received a great deal of judicial attention in the lower federal courts during the final years of the 1990's. Litigation in this area typically occurs after a school board implements a policy that limits, according to race, the number of students who can be admitted or who can transfer into or between schools. These policies are typically created by school boards but can also be mandated by state statute. In one case, the Akron, Ohio, City School District was involved in the first challenge in federal court of a unitary school district's attempt to maintain a proper racial balance under the direction of a state open-enrollment statute.[26] Akron created its race-based limitation pursuant to the Ohio legislature's statutory mandate to maintain "racial balance" when implementing an inter-district open enrollment plan.[27] In an attempt to comply with this statute and control "white flight," the board adopted a policy prohibiting white students from transferring out of the school district and prohibiting non-white students from transferring into the district. The plaintiffs then filed suit pursuant to Section 1983 claiming violations of their Fourteenth Amendment rights of equal protection. The court rejected the school board's argument that the policy served the compelling interest of preventing *de jure* segregation and implied that race-conscious measures could be upheld only as a remedy for past discrimination.[28] Further, the court maintained that the complete exclusion of white students from participation in open enrollment as a means of achieving an appropriate racial balance was not narrowly tailored. Rather, the court viewed the policy as the most drastic, overbroad method available that could encompass members of many different racial and ethnic backgrounds. The court granted the plaintiffs' motion for a preliminary injunction in concluding not only that they were likely to have success on the merits of their claim, but also because the policy was not narrowly tailored to achieve a compelling governmental interest.

The continuing constitutionality of statutes, like the aforementioned Ohio law, is suspect according to the language of recent appellate circuit opinions. For example, the Sixth Circuit remarked that:

> [r]acial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors.[29]

Accordingly, such statutes appear to be unconstitutional to the extent they require an affirmative duty from all schools with open enrollment policies to create policies to maintain a proper racial balance.

In Boston, after a finding of *de jure* segregation and the subsequent 1987 relinquishment of court-enforced remedies, some city schools were accused of violating equal protection again in 1996 by making admission decisions pursuant to a policy that reserved seats for Black and Latino students.[30] This set-aside policy was subsequently revised in 1996 and replaced by flexible racial/ethnic guidelines to be used in admissions actions. Under the new policy, a white female student was denied admission to the Boston Latin School but admitted to the Boston Latin Academy. The record revealed that the student would have been admitted to the Boston Latin School had all applicants been selected solely on grade point averages and test scores. The admission policy provided that students applying to the examination schools, which include the Boston Latin School, the Boston Latin Academy, and the John D. O'Bryant School of Mathematics and Sciences, were included in the Applicant Pool for each school that the applicants designated. Each student was ranked within the applicant pool based on his or her composite score, a combination of grade point average, and score on the Independent School Entrance Examination. All students ranked in the top half of the applicant pool were designated as the Qualified Applicant Pool. Fifty percent of the available seats in each school were filled on a straight-from-the-top basis according to composite score. The remaining seats for each school were filled based on a combination of composite score ranking and flexible racial/ethnic guidelines. Under these guidelines, the remaining seats were allocated based on composite score rank in proportion to the racial/ethnic composition of the school's remaining qualified applicant pool.

The student unsuccessfully challenged the admissions policy on the basis that it violated the Fifth and Fourteenth Amendments. School officials argued that they had a compelling interest in the policy not only because a diverse student body increases the quality of education, but also because it was designed as a remedy for past discrimination. After the federal trial court in Massachusetts rejected the student's request for an injunction that would have permitted her to enter the Boston Latin school,[31] she sought further review. The First Circuit reversed in reasoning that the admissions program was not sufficiently narrowly tailored to further a compelling governmental interest.[32] The court indicated that school officials failed to demonstrate a compelling interest in a policy to promote student diversity because it was not in any way tied to the vigorous exchange of ideas. Moreover, the court posited that statistical evidence of an achievement gap between students of different races was insufficient to prove that vestiges of the school system's past discrimination remained. The court did not believe that school officials produced evidence sufficient to prove a compelling interest in diversity or in remedying past discrimination. Thus, the court held that the policy was not designed to redress past discrimination insofar as it was simply a method for achieving the constitutionally impermissible goal of racial and ethnic balance.

In New York, a student sought the benefits of a program that allowed children to transfer from one school district to another.[33] The child met all of the criteria for admission except that she was white and only minority students were eligible for the program. In support of its position, school district officials created a comprehensive mission statement outlining the benefits that the race-based program would bring to the educational environment. A federal trial court in New York recognized that although the program had several stated goals, the only method used to achieve them was a program designed to reduce the percentage of minority students in predominantly minority city schools and to increase the percentage of minority students in the predominantly white suburban schools. The court, quoting the United States Supreme Court, noted that "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[34] The court further observed that, like the program at issue in Akron, this board adopted the most drastic approach available because it completely barred any white student from being considered for a transfer. As such, the court agreed that the program violated the student's right to equal protection and was denied an opportunity to participate in a program that was not narrowly tailored to further a compelling interest. The Second Circuit vacated and remanded the case, stating the parents failed to demonstrate a clear likelihood of success. The court questioned whether the goal of reducing *de facto* segregation served a sufficiently compelling government interest to justify the use of a racial classification.[35]

In a case from Virginia, the Fourth Circuit vitiated an admission policy that was designed to create a student body that would be better prepared for life in a diverse society.[36] The admission policy defined diversity by using three factors: the income level of an applicant family or an applicant's having a special family background, an applicant's primary language, and an applicant's racial or ethnic group. Using the three factors, officials employed a sequential, weighted, random lottery to select students who had not already been admitted because older siblings attended the school. The policy gave under-represented groups an advantage in the admission process. Two prospective students sought to enjoin the school from using the weighted admissions policy. The Fourth Circuit reviewed the policy under strict scrutiny analysis and ascertained that since it was not narrowly tailored, it should be struck down as a violation of equal protection.

Soon after, the Fourth Circuit heard another racial classification suit and found that schools that choose to implement policies using race as a classification face the presumption that they cannot be sustained.[37] Here, the parents of a seven-year-old in Maryland brought suit after school officials denied their request to transfer him to a mathematics and science magnet school because doing so would have reduced the racial balance in the school that he wanted to leave. The school system had never been the target of a court-ordered desegregation policy. Instead, the district voluntarily desegregated its schools by creating magnet schools to establish a diverse student body. The Fourth Circuit struck the policy down as a classic example of impermissible racial balancing in ruling that it was not narrowly tailored insofar as there was no determination of whether diversity is a compelling interest. In addition to vitiating the policy, the court entered a preliminary injunction requiring school officials to admit the student and a final injunction requiring them to reconsider his application without considering his race.

Teacher Assignments Based on Race

In addition to manipulating student assignments, school district officials have also assigned teachers on the basis of race. In Texas, where a school district had achieved unitary status,[38] officials sought the approval of the actions of a variance committee which was created to monitor teacher assignments in order to eliminate racially-identifiable schools.[39] The committee consisted of five school administrators and the area assistant superintendent. The Fifth Circuit approved the actions of the committee, but limited its future use in response to a new 75%-25% plan implemented by the school. This plan declared schools desegregated if its minority teacher ratio remained between 25 percent and 75 percent. The court agreed that the proposed system of assignments satisfied the requirement that the district achieve the maximum desegregation practicable in placing teachers.

Standing

The question of standing continues to be litigated in desegregation cases. A federal trial court in Georgia recognized that a special interest group representing a class of school children had standing.[40] Conversely, in Illinois, a public interest group unsuccessfully moved to intervene in a desegregation case between a local board of education and the state board of education and its superintendent. The Seventh Circuit affirmed the dismissal of the motion based on its determination that the public interest group lacked the interest necessary to support its intervention since it was unable to show how it would have benefitted from the outcome of the issue being litigated.[41] Similarly, in Florida, an unincorporated association and two students sought damages and injunctive relief based on a school board's alleged racially discriminatory practices. A federal trial court agreed that while the association had the capacity to bring suit, it did not have standing because it did not establish that any of its members suffered an actual or imminent injury in fact.[42]

Intervention in Desegregation Lawsuits

As reflected by a case from Missouri, students have been limited in their ability to intervene in desegregation suits. In 1996, the Eighth Circuit upheld the denial of a motion by students and their parents in Kansas City to intervene in a school desegregation suit where the proposed intervenors felt that the current plaintiffs were not representing their interests.[43] At the same time, the court offered that the plaintiff class was adequately representing the proposed intervenors and did not allow them to participate in the litigation. In North Carolina, a federal trial court did grant permission to the father of a student to intervene and consolidate his case with another that challenged a race-based admission policy. The court allowed for consolidation because both actions were timely, concerned a common question of law or fact, and would not delay or prejudice the adjudication of the original parties.[44]

Consolidation and Deconsolidation in Schools

In the course of a desegregation plan, some schools have attempted to carry out both consolidation and deconsolidation plans. For example, in Louisiana a federal trial court denied a school board's request to divide into independent school districts because the school was under a desegregation plan and had failed to achieve unitary status. The deconsolidation would have resulted in one school district's becoming slightly more black than white and the new district becoming overwhelmingly white. The court decided that the school division would have hindered efforts to desegregate the existing school system.[45] Subsequently, the Fifth Circuit vacated the trial court's judgment because the matter was not ripe for review, explaining that there was no imminent threat of harm to the district or the desegregation decrees, only potential harm.[46] Nearly a year later, the Fifth Circuit spoke to the issue again.[47] This time the panel remanded the case to the trial court with the instructions that the new district select a board of trustees and conduct more hearings to allow the state and the new board the opportunity to demonstrate that the new district will not adversely impact the desegregation plan that was in place in the school district

A county board of education in Alabama successfully petitioned for judicial approval to consolidate a school district that was under a desegregation order and to relocate students within the system. A fire destroyed one school, and it was not economically feasible to build another.[48] A federal trial court pointed out that the proposed consolidation plan was acceptable because it neither perpetuated nor reestablished a racially segregated dual school system.[49]

Rights of Teachers

The rights of teachers can be at issue incident to a desegregation plan. For example, teachers in Arkansas appealed an order that required them to end a strike against a school district that was subject to a consent decree in a desegregation case. The Eighth Circuit reversed in favor of the teachers, maintaining that the trial court lacked the authority to enjoin the strike because nothing in the desegregation settlement agreement could be read as denying the teachers their right to strike.[50] Further, the court mentioned that a strike could not be characterized as a modification of the consent decree since such a change can only be accomplished by a judicial order, not an order by the parties.

Retirement and health insurance plans for teachers have come under judicial scrutiny with respect to desegregation agreements. The Eighth Circuit affirmed that the state school funding system in Arkansas violated desegregation agreements.[51] The court acknowledged that the funding system provided money to school districts to be distributed to teachers based on the number of students in a district and the wealth of the district. The court added that the system provided proportionally less money to teachers at three districts that were under desegregation plans because of mandated staffing increases.

Attorney Fees

Attorney fees are often debated for several different reasons in desegregation matters. In one example concerning a school in Kansas City, the plaintiff class opposed the Desegregation Monitoring Committee's use of an interactive electronic communication system called ShareNet because it was not part of the original voluntary inter-district transfer plan.[52] The Eighth Circuit affirmed an award of attorney fees, on the basis that the state had to pay attorney fees for defending the desegregation remedy even though it, too, disagreed with the use of ShareNet.

Attorney fees became an issue in a case evaluating whether a district's achievements warranted unitary status. The Eighth Circuit affirmed an award of the plaintiffs' attorney fees for the work in defending the State's appeal of unitariness. Additionally, the court supported an award of attorney fees in the settlement agreement issues and for the time counsel spent in seeking a stay pending an appeal. However, the court rejected a claim for the time that the attorney spent talking with the media.[53] The court found that the terms of the settlement did not shift liability to the school district for an award of statutory attorney fees incurred by the plaintiffs in opposing the approval of the agreement.

Recommendations for Practice

The continuing battle to desegregate public education is nowhere more evident than in Gary Orfield's[54] report of the resegregation of urban American schools. He reported that in the early 1990s, many of the nation's largest urban school systems were more segregated on race than they were a quarter of a century earlier. More recently, Orfield has documented the growing resegregation of American schools.[55] Unfortunately, since the mid-1970s the Supreme Court has discontinued an activist role in ensuring educational equity. This inactivity has been caused by a combination of the Court having followed the trend of four of the six administrations since 1968 that have resisted urban desegregation orders, a change in its composition, and a profound difference in societal attitudes.

- One can only wonder why state (and local) educational agencies have not adopted proactive stances in implementing *Brown*.
- It may be that many locations throughout the nation act as if *Brown* had never been decided because the Court's inactivity has signaled that desegregation is no longer a priority among national goals and objectives.
- As the Supreme Court's final word on the legacy of *Brown*, *Jenkins* signals the continuation of its retreat from active involvement in school desegregation.

One can only hope that as the United States stands at the dawn of a new Millennium, the Court will remain true to the spirit of *Brown* and guarantee equal protection under the law for all students.

References

[1] For a review and discussion of these cases, *see* C. J. RUSSO, J. J. HARRIS, & R. F. SANDIDGE, *Brown v. Board of Education at 40: A Legal History of Equal Educational Opportunities in Public Education*, 63 J. NEGRO EDUC. 297 (1994).

[2] In Washington v. Seattle Sch. Dist., 458 U.S. 457 (1982) and Crawford v. Board of Educ. of the City of Los Angeles, 458 U.S. 527 (1982) both decided on the same day, the Court examined the legality of state-approved voter initiatives that limited the impact of desegregation plans. In so doing, the Court rejected Washington State's proposed action but upheld California's amendment of the state constitution.

[3] Missouri v. Jenkins, 495 U.S. 33 (1990).

[4] Oklahoma City Public Schs. v. Dowell, 498 U.S. 237 (1991).

[5] Freeman v. Pitts, 503 U.S. 467 (1992).

[6] Missouri v. Jenkins II, 515 U.S. 70 (1995).

[7] Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

[8] 495 U.S. 33 (1990).

[9] *Jenkins*, 495 U.S. 33 (1990).

[10] *In Green*, 391 U.S. 430 (1968) the Court identified six factors that must be taken into account in evaluating whether a district has achieved unitary status: the composition of the student body, faculty, staff, transportation, extracurricular activities, and facilities.

[11] Freeman v. Pitts, 503 U.S. 467 (1992)

[12] *Jenkins II*, 515 U.S. 70 (1995).

[13] Including an earlier denial of *certiorari* in Missouri v. Jenkins, 484 U.S. 816 (1987), and *decision on the merits*, 495 U.S. 33 (1990).

[14] The report is available on line at http://www.usdoj.gov/crt/activity.html The data cited in the text are listed under "Educational Opportunities Section."

[15] Equal Open Enrollment Ass'n v. Board of Educ. of the Akron City Sch. Dist., 937 F. Supp. 700 (N.D. Ohio).

[16] *Jenkins*, 495 U.S. 33 (1990) (for a list of the six *Green* factors).

[17] Lockett v. Bd. of Educ. of Muscogee County Sch. Dist., 111 F.3d 839 (11th Cir. 1997), *reh'g, en banc, denied*, 121 F.3d 724 (11th Cir. 1997).

[18] *De jure* segregation generally refers to segregation directly intended or mandated by law or otherwise issuing from an official racial classification or in other words, to segregation which has or had the sanction of the law. BLACK'S LAW DICTIONARY 425 (6th ed. 1990).

[19] United States v. Board of Pub. Instruction of St. Lucie County, 977 F. Supp. 1202 (S.D. Fla. 1997).

[20] Tasby v. Woolery, 869 F. Supp. 454 (N.D. Tex. 1994).

[21] United States v. Unified Sch. Dist. No. 500, Kansas City, 974 F. Supp. 1367 (D. Kan. 1997).

[22] Keyes v. Congress of Hispanic Educators, 902 F. Supp 1274 (D. Colo. 1995).

[23] Stanley v. Darlington County Sch. Dist., 879 F. Supp. 1341 (D.S.C. 1995), *rev'd in part on other grounds*, 84 F. 3d 707 (4th Cir. 1996).

[24] Coalition To Save Our Children v. Board of Educ., 90 F.3d 752 (3d Cir. 1996).

[25] United States v. Yonkers Bd. of Educ., 984 F. Supp. 687 (S.D.N.Y. 1997); *aff'd*, United States v. Yonkers Bd. of Educ., 181 F.3d 301 (2d Cir. 1999). *See also*, United States v. Yonkers Bd. of Educ., 992 F. Supp. 672 (S.D.N.Y. 1998); United States v. Yonkers Bd. of Educ., 7 F. Supp.2d 396 (S.D.N.Y. 1998)

[26] Equal Open Enrollment Ass'n v. Board of Educ. of the Akron City Sch. Dist., 937 F. Supp. 700 (N.D. Ohio 1996) (proce-

durally, Equal Open Enrollment Association considers whether a preliminary injunction should be issued against the Akron School District. This case, therefore, does not resolve any of the issues before it with finality).

[27] Ohio Rev. Code § 3313.98(B)(2)(c).

[28] Equal Open Enrollment Ass'n v. Bd. of Educ. of the Akron City Sch. Dist., 937 F. Supp. 700 (N.D. Ohio 1996); *See also*, Hopwood v. Texas, 78 F. 3d 932, 944 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996); Taxman v. Board of Educ. of Township of Piscataway, 91 F. 3d 1547, 1563 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117 (1997), *cert. dismissed*, 522 U.S. 1010 (1997).

[29] Reed v. Rhodes, 179 F.3d 453, 466 (6th Cir. 1999) (citing Freeman v. Pitts, 503 U.S. 467, 494 (1992)).

[30] *See, e.g.*, Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass.), *aff'd sub nom.*, Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974); Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987); McLaughlin v. Boston Sch. Comm., 938 F. Supp. 1001 (D. Mass. 1996).

[31] Wessmann v. Boston Sch. Comm., 996 F. Supp. 120 (D. Mass. 1998).

[32] Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998).

[33] Brewer v. West Irondequoit Cent. Sch Dist., 32 F. Supp.2d 619 (W.D.N.Y. 1999).

[34] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978).

[35] Brewer v. West Irondequoit Cent. School Dist., 212 F.3d 738 (2d Cir. 2000).

[36] Tuttle v. Arlington County Sch. Bd., 189 F.3d 431 (4th Cir. 1999). *See also*, Capacchione v. Charlotte-Mecklenburg, 57 F. Supp.2d 228 (W.D.N.C. 1999)

[37] Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1420 (2000).

[38] *See* Tasby v. Woolery, 869 F. Supp. 454 (N.D. Tex. 1994), *supra* note 19.

[39] Tasby v. Gonzales, 972 F. Supp. 1065 (N.D. Tex. 1997).

[40] *See* Coalition to Save Our Children v. State Bd. of Educ., 901 F. Supp. 784, 792 n. 17 (D. Del. 1995) *aff'd*. 90 F.3d 752 (3d Cir. 1996); *compare with* Georgia State Conf. of Branches of NAACP v. State of Ga., 99 F.R.D 16, 35 (S.D. Ga. 1983).

[41] Rockford Bd. of Educ. v. Illinois Bd. of Educ., 150 F.3d 686 (8th Cir. 1998).

[42] Citizens Concerned About Our Children v. School Bd. of Broward County, 966 F. Supp. 1166 (S.D. Fla. 1997) *aff'd in part and rev'd in part on other grounds*, 193 F.3d 1285 (11th Cir. 1999). *Compare*, Parents for Quality Educ. v. Ft. Wayne

Comm. Sch., 662 F. Supp. 1475 (N.D. Ind. 1987); and Bronson v. Board of Educ. of City of Cincinnati, 573 F. Supp. 767 (S.D. Ohio 1983) *mandamus denied*, 725 F.2d 682 (6th Cir. 1983).

[43] Jenkins by Jenkins v. State of Mo., 78 F.3d 1270 (8th Cir. 1996).

[44] Capacchione v. Charlotte-Mecklenburg Bd. of Educ., 179 F.R.D. 502 (W.D.N.C. 1998).

[45] Valley v. Rapides Parish Sch. Bd., 960 F. Supp. 96 (W.D. La. 1997).

[46] Valley v. Rapides Parish Sch. Bd., 145 F. 3d 329 (5th Cir. 1998).

[47] Valley v. Rapides Parish Sch. Bd., 173 F. 3d 944 (5th Cir. 1999).

[48] Lee v. Geneva County Bd. of Educ., 892 F. Supp. 1387 (M.D. Ala. 1995).

[49] *Id.*; *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[50] Knight v. Pulaski County Special Sch. Dist., 112 F.3d 953 (8th Cir. 1997).

[51] Little Rock Sch. Dist. v. North Little Rock Sch. Dist., 148 F.3d 956 (8th Cir. 1998).

[52] Jenkins by Agyei v. State of Mo., 73 F.3d 201 (8th Cir. 1996). *See also*, Northcross v. Bd. of Educ., 611 F. 2d 624, 637 (6th Cir. 1979) *cert. denied* 447 U.S. 911 (1980).

[53] Jenkins by Jenkins v. State of Mo., 131 F.3d 716 (8th Cir. 1997).

[54] G. ORFIELD, *The Growth of Segregation in American Schools: Changing Patterns of Separation and Poverty Since 1968* (1993).

[55] *See* G. ORFIELD & J. T. YUN, *Resegregation in American Schools*, THE CIVIL RIGHTS PROJECT, Harvard University (June 1999). http://www.law.harvard.edu/groups/.../publications/resegregation99.html. *See also* G. ORFIELD, S. E. EATON, and the HARVARD PROJECT ON SCHOOL DESEGREGATION, *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education*, (1996).

31

New Directions in School Law

Mary Jane Connelly

Introduction

This book, written by top experts in the field of school law, addresses those legal issues that confront school teachers and administrators and, in particular, school principals. It covers a comprehensive list of legal subjects prevalent in K-12 education, but it is not exhaustive in its coverage. Readers are cautioned that the law is subject to change as new federal and state constitutional laws, rules, and regulations are added or amended. Interpretation of the law by federal and state courts may also impact and cause changes in the law.

What may administrators and teachers expect in the future? Litigation will continue on many of the issues already identified in the various chapters. It is interesting to note however, that many of the legal issues litigated over the past sixty years and addressed in the text are becoming well settled law. Examples include: Fourth Amendment search and seizure rights; freedom of religious expression; substantive and procedural due process rights; student and personnel records; censorship; student and teacher dismissal; certification; school finance; and desegregation. Last summer, the United States Supreme Court handed down *Santa Fe Independent School District v. Doe.*[1] The Court, in a 6-3 decision, reaffirmed its position that public schools could not favor one religion over another by allowing a specific prayer to be recited over the megaphone prior to a game.

Recent decisions handed down by the United States Supreme Court may be more conservative than earlier, more sweeping decisions. Today's decisions are focusing on specific remedies. Recently the United States Supreme Court handed down the Americans with Disabilities Act (ADA) decision, *Board of Trustees of The University of Alabama v. Garrett,*.[2] In a 5-4 decision, the Supreme Court did not allow Alabama state employees monetary damages under the

ADA because the Act violated the Eleventh Amendment of the United States Constitution. Congress had to provide remedies for violation of Title One under the ADA specifically tailored to remedy the wrong done by state employers to state employees.[3]

Presently, the Supreme Court is headed by Chief Justice William Rehnquist originally appointed by President Nixon as an Associate Justice and President Reagan as Chief Justice. The eight Associate Justices and the President nominating them are: President Gerald Ford nominated John Paul Stevens; President Ronald Reagan nominated Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy; President George Bush nominated David Souter and Clarence Thomas; and President Bill Clinton nominated Ruth Bader Ginsberg and Stephen Breyer. It would seem the present Court tends to be more conservative but the above cases upheld the doctrine of separation of church and state but not sweeping remedies for violation of state handicapped victims rights under Title One under the ADA.

Changing Legal Issues

Other issues covered in the text are not as well settled in the law. Examples include child abuse and sexual harassment, student-to-student sexual harassment, desegregation, and affirmative action. Case law dealing with child abuse and sexual harassment is not atypical today. *Larson v. Miller*,[4] earlier cited in the text, demonstrates this point. Compensatory and punitive damages were awarded to a special education student, and the driver of the school van was convicted of sexual abuse. Increasingly, school administrators need to investigate complaints in an attempt to provide a safe environment for students.

The law on student-to-student sexual harassment remains unsettled, and school administrators will have to keep abreast of federal and state court rulings as well as local decisions, rules and regulations. Guidance from the legislature and the United States Supreme Court will be needed before there is common agreement on appropriate procedures to follow in such situations. Ignorance on such sensitive issues will not act as a defense.

The Supreme Court of the United States has shifted its proactive stance on the desegregation of public schools since the 1954 *Brown v. Board of Education of Topeka* decision.[5] In guaranteeing equal protection under the law for all students, narrowly-tailored decisions are more acceptable. Attention is now shifting to the resegregation of American urban education, and school policymakers will have to design programs specifically targeted to uphold the Equal

Protection Clause. The Supreme Court will no longer accept solutions that have not proved to be successful in the past..

Recent affirmative action plans, such as that found in *Hopwood v. Texas*,[6] have caused dissatisfaction with admission policies in higher education institutions. The *Hopwood* plan had not been narrowly tailored to address the requirements of Title VII and the Equal Protection Clause. Under Title VII, an employer must show a legitimate reason for an affirmative action plan; and under the Equal Protection Clause, there must be compelling state reason for the plan. These plans must be temporary and terminate upon successfully reaching targeted goals. Further, these plans, designed to overcome historic patterns of discrimination, cannot interfere with the right of nonminority workers. Support for affirmative action plans, long practiced but unsuccessful in achieving their goals, will no longer receive the endorsement of the courts.

Recommendations for Practice

School principals are faced with a multiplicity of legal issues that they must deal with on a daily basis. This book was developed as a source for administrators to use when faced with legal challenges. There is no substitute for good school law courses, legal conferences or appropriate in-service workshops. The expansion of website services available on the internet has greatly increased the probability that principals, administrators and teachers can remain current as well as learn new trends in school law. Courts will support the thoughtful, conscientious and careful administrator and teacher who has acted in a fair and reasonable manner. Ignorance of the law is never a defense and it is imperative that school officials keep abreast of developing legal issues.

- It is possible, with the present composition of a conservative Supreme Court, that there will be a continuing shift toward more conservative decisions. Court watchers may see further movement toward more narrowly defined decisions as courts struggle with such issues such as: child abuse, sexual harassment, special education, academic freedom, desegregation and affirmative action.
- Principals, administrators and teachers should take an active stance in staying abreast of the developments in school law. Sources of information for updates include legal conferences, newsletters, websites, and books published by professional organizations such as the Education Law Association (ELA). Other sources include appropriate legal journals and monographs.

- Principals should offer regular staff development sessions to their faculty and staff on school law. In-service, offered through attorneys and university faculty, provides recent information on changes in laws as well as current changes in rules and regulations that impact school operations.

References

[1] Santa Fe Indep. Sch. Dist. v. Doe, No. 99-62 (June 19, 2000).

[2] Board of Trustees of The University of Alabama v. Garrett, No. 99-1240 (February 21, 2001).

[3] Americans with Disabilities Act of 1990 (ADA). 42 U.S.C. § 12112(a).

[4] Larson v. Miller, 76 F.3d 1445 (8th Cir. 1996).

[5] Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

[6] Hopwood v. Texas, 518 U.S. 1033 (1996).

INDEX

academic freedom / 239-243
Acquired Immune Deficiency Syndrome (AIDS) / 185, 189, 191, 192, 194-196, 321
ADA (Americans with Disabilities Act) / 101-104, 151, 186-187, 190, 204-205, 354, 401-402
admission / 378-381, 390-392
affirmative action / 373-381, 403
AIDS (See Acquired Immune Deficiency Syndrome)
alcohol / 18, 37, 120
alternative dispute resolution / 359-364
Americans with Disabilities Act (See ADA)
athletics / 14-15

bible / 302-303, 314-316, 323
bilingual program / 337

censorship / 28
certification / 120, 279-286
charter schools / 351-356
child abuse / 55-65
church / state
  (See establishment of religion)
  bible reading / 315-316, 323
  prayer / 294, 297
  secular humanism / 316-317, 336
  Lemon Test / 293, 314, 335
consolidation / 394
copy-right material / 341-348
corporal punishment / 38-39, 60-62

defamation / 214
desegregation / 352-353, 378-380, 385-396, 402
disabilities / 173
  alternative placement / 106,131-134, 139-141, 173
  behavioral plan / 127, 138
  disciplinary procedures / 107-108, 127-141
  exclusion from school / 42-43, 128
  expulsion / 134-137, 140-141
  free appropriate education / 105-106, 116, 157, 169, 171-172, 174,187, 193, 196
  inclusion / 107
  individual education plan / 105-106, 127-131, 133-136, 138-141,147-148, 153, 157-178, 187
  in school suspension / 130-131
  least restrictive environment / 106-107, 149, 196
  procedural due process / 43
  "stay put" program / 42
  suspension / 128-131, 139-140
  transition / 145-154, 170
  tuition / 108
discipline / 37-43
  corporal punishment / 38-39
  expulsion / 40-43
  handicapped children / 127-141
  student code of conduct / 37
  suspension / 37, 40-43
discrimination / 118, 214, 253, 337, 374, 386-388, 391
dismissal / 282-283
documentation / 257-265
drugs / 3, 5, 7-8, 11-12, 14, 41, 132, 136
drug testing / 14, 41
due process
  (See procedural due process) / 39, 41, 49-54, 250, 273, 284
  students / 37, 39-40
  teachers / 250, 273, 284

Eighth Amendment / 39, 49, 60-61
Eleventh Amendment / 402
employment
  certification / 279-286
  evaluation / 245-254
Equal Access Act / 30, 300-302
equal protection laws / 187, 234, 333, 353, 375-376, 380, 392, 402-403
Establishment Clause / 293-300, 313, 319, 324-325, 335

establishment of religion / 293-304, 313-327
  bible reading / 315-316, 323
  creationism / 318
  evolution / 318-319, 335-336
  graduation exercises / 295-297
  holiday observance / 299-300, 317, 321-322
  moment of silence / 294
  prayers / 294, 297
  secular humanism / 316-317, 336
  ten commandments / 299-300
evaluation / 245-254
expulsion / 42-43, 50
extracurricular activities / 15, 29, 117

facilities / 201-207, 368-369
FERPA / 87-95, 138-139, 166, 174, 195, 197
Fifth Amendment / 391
finance / 353, 367-371
First Amendment / 25, 28, 31-32, 214, 240, 267, 293, 302, 319-320, 323, 333, 335
flag salute / 33, 320
Fourteenth Amendment / 40, 49, 61, 63, 74, 187, 191-192, 214, 375, 380, 391
Fourth Amendment / 11,14-16, 18, 62, 214
Free Exercise Clause / 296, 319-320, 325-326
  disruptive expression / 26-27
  freedom of expression / 25-33, 240, 267-268
  obscene remarks / 27

hepatitis / 185, 190, 192, 195

IDEA / 42-43, 91, 104-108, 115-116, 127-128, 130, 132, 135, 138, 145, 149, 157, 161-162, 164-165, 170-171, 175, 186, 191, 193, 354, 361-362
immunity / 10-11, 13, 213, 218-220
incompetency / 248
infectious diseases / 185-197
instructional program / 331-337
  library / 333-335
intellectual property / 341-345

liability / 58, 63, 70-71, 213-214, 218-220, 230, 233

mediation / 361-363
medication / 117
Miranda warning / 42
misconduct / 120-121, 219

negligence / 218-220
negotiation / 360-361

obscenity / 32

prayer / 294, 297
privacy rights / 87-88, 214
  drug testing / 12, 15-16
  search and seizure / 15
procedural due process / 38-39, 49-54 ,167, 175, 250, 273, 284
  corporal punishment / 38-39
  right to present evidence / 39, 52
  right to representation / 52
publication
  religion / 30
  school-sponsored / 27-29, 240, 332-333
  student-sponsored / 28-29

reasonable accommodations / 102-103, 112, 116-119, 189, 196
records / 87-95, 168, 174, 178
reduction in force / 273-274
religion (see church/state) / 293-304, 313-327
  Lemon test / 293, 314, 335

safe schools / 4, 19
search and seizure / 3-20
  autos / 7
  bookbag / 6
  drug-detecting dog / 16
  drugs / 3, 5, 7-8, 11, 14-15
  Fourth Amendment / 11, 14-16, 18

  general or random searches / 13-17
  lockers / 4-6
  off school grounds / 17-18
  pat-down / 8-9
  probable cause / 13
  purse / 7
  reasonable suspicion / 3-4, 6-8, 11, 19
  strip searches / 9-13
Section 1983 / 41, 55, 74-75, 379
Section 1985 / 55
Section 504 / 44, 101-104, 115-122, 135, 150, 186-189, 191-195, 197, 205
secular humanism / 316-317, 336
sex education / 336-337
sexual abuse / 57, 62-64
sexual harassment / 64, 214, 227-235
  employees / 227-235, 247-248
  students / 69-79, 402
student injury / 213-221
student publication
  school sponsored / 27-29, 240, 332-333
student rights
  discipline / 37-43, 127-141
  freedom of speech / 25-33
  procedural due process / 38-39, 49-54, 167, 175, 250, 273, 284
  right to a safe school / 4,19
  search and seizure / 3-20
suspension of student / 18, 27, 50-51
symbolic speech / 26

teacher dismissal / 267-275
  documentation / 257-265
  immorality / 269-270
  incapacity / 269
  incompetency / 269
  insubordination / 269-271
  non-tenured teacher / 268
  seniority / 274
  tenured teacher / 269-273
  unfitness to teach / 270
teacher evaluation / 245-254
teachers' rights
  assignment / 393
  certification / 279-286
  competency exam / 282
  procedural due process / 284
  reduction in force / 273-274
  sexual harassment / 227-235, 247-248
tenure / 269-271
Title VI / 186, 333, 373, 375, 377, 379
Title VII / 69-70 ,76, 228-232,373-374, 376-377
Title IX / 63-64, 70-76, 214, 232-234, 377
tort liability / 39, 214, 219
tuberculosis / 185, 195

urinalysis / 14

vulgarity / 32

weapons / 4-5, 9, 16-17, 132, 136
witnesses / 52

AUTHORS

Alexander, M. David
Department Chair and Professor, Department of Educational Leadership and Policy Studies, College of Human Resources and Education, Virginia Polytechnic Institute and State University, Blacksburg, Virginia.

Ausbrooks, Carrie Y. Barron
Assistant Professor, Educational Administration and Supervision, College of Education, and Associate Director, UNT Center for the Study of Education Reform, University of North Texas, Denton, Texas.

Beckham, Joseph C.
Allan Tucker Professor of Educational Leadership and Policy Studies, The Florida State University, Tallahassee, Florida.

Camp, William E.
Professor, Teacher Education and Administration, University of North Texas, Denton, Texas.

Clark, Susan G.
Assistant Professor, Educational Administration, Department of Educational Foundations and Leadership, College of Education, University of Akron, Akron, Ohio.

Connelly, Mary Jane
Department of Instructional Technology, Curriculum and Evaluation, University of Tennessee, Knoxville, Tennessee.

Cornelius, Luke M.
Assistant Professor, Department of Educational Leadership and Professional Studies, College of Education, State University of West Georgia, Carrollton, Georgia.

Crockett, Jean B.
Professor, Division of Administrative and Educational Services, College of Education, Virginia Polytechnic Institute and State University, Blacksburg, Virginia.

Cummings, Jay
Associate Professor, Educational Administration Program, Teacher Education and Administration Department, College of Education, University of North Texas, Denton, Texas.

Curcio, Joan L. *(published posthumously)*
Professor, Division of Administrative and Educational Services, College of Education, Virginia Polytechnic Institute and State University, Blacksburg, Virginia.

Curtis, Timothy W.
Currently Paternity and Child Support Establishment Attorney, Lancaster County Attorney's Office, Lincoln, Nebraska. Formerly a Prosecutor at the Platte County Attorney's Office.

Delon, Floyd G.
Professor Emeritus, University of Missouri, Columbia, Missouri.

Dickinson, Richard J.
General Counsel, Ohio School Boards Association, Columbus, Ohio.

Frels, Kelly
Managing Partner, Bracewell and Patterson, LLP, Houston, Texas.

Gessford, James B.
Attorney, Perry Guthery Haase & Gessford, Lincoln, Nebraska.

Goldberg, Steven S.
Professor, Beaver College Educational Leadership Program, Glenside, Pennsylvania; Adjunct Professor of Education Law and Alternative Dispute Resolution, Rutgers Law School, Camden, New Jersey; and Lecturer in Education Law, University of Pennsylvania Graduate School of Education.

Hartmeister, Fred
Associate Professor of Education and Law, Texas Tech University, Lubbock, Texas.

Horner, Jeffrey J.
Attorney, Bracewell and Patterson, LLP, Houston, Texas.

Huffman, Jane B.
Assistant Professor, University of North Texas, Denton, Texas.

Hughes, Mary F.
Associate Professor of Educational Administration, University of Arkansas, Fayetteville, Arkansas.

Irvin, Ed
Deputy Attorney General, State of Nevada; Doctoral Student, Educational Leadership, University of Nevada-Reno.

Kemerer, Frank R.
Regents Professor of Education Law and Administration, College of Education, University of North Texas, Denton, Texas.

Lane, Kenneth E.
Professor of Educational Administration and Director of the National Center for Excellence in Distance Learning, California State University, San Bernardino, California.

Martin, Julie C.
Attorney, Scott Scriven & Wahoff, LLP, Columbus, Ohio.

Mawdsley, Ralph D.
Professor of Educational Administration, Department of Counseling, Administration, Supervision and Adult Learning, Cleveland State University, Cleveland, Ohio.

McCarthy, Martha M.
Chancellor Professor, School of Education, Indiana University, Bloomington, Indiana.

McNair, Jeff
Professor of Special Education, California State University, San Bernardino, California.

Mead, Julie F.
Assistant Professor, Department of Educational Administration, University of Wisconsin-Madison.

Mendonca, Sarah L.
Ph.D. Candidate, Department of Educational Leadership, Policy, and Foundations, College of Education, University of Florida, Gainesville, Florida

Metzler, Donna
Attorney, Law Offices of Stuart L. Whitt, Aurora, Illinois.

Miller, Margaret Bannon
Partner, Bose, McKinney & Evans, L.L.P., Indianapolis, Indiana.

Osborne, Jr., Allan G.
Principal, Snug Harbor Community School, Quincy, Massachusetts, and Visiting Associate Professor at Bridgewater State College.

Richardson, Michael D.
Professor of Educational Administration, Georgia Southern University, Statesboro, Georgia.

Risch, Judith
Law and Doctoral Student, University of Wisconsin-Madison, Madison, Wisconsin.

Russo, Charles J.
Professor, Department of Educational Administration, and Fellow, Center for International Programs, School of Education and Allied Professions, University of Dayton, Dayton, Ohio.

Salmon, Richard G.
Professor, Division of Administrative and Educational Services, College of Education, Virginia Polytechnic Institute and State University, Blacksburg, Virginia.

Schimmel, David M.
Professor of Education, University of Massachusetts, Amherst, and Visiting Professor, Harvard's Graduate School of Education.

Schmitz, Patrick J.
Deputy Director of Legal Services, Ohio School Boards Association, Columbus, Ohio.

Scholler, W. Joseph, III
Attorney, Frost Brown Todd, Middletown, Ohio. Practice focusing on school law and other public entities.

Scott, Lynn Rossi
Partner, Bracewell and Patterson, LLP, Dallas *(by appointment)* and Fort Worth, Texas.

Sparkman, William E.
Dean, College of Education, University of Reno, Reno, Nevada.

Sughrue, Jennifer
Assistant Professor, Virginia Tech University, Blacksburg, Virginia.

Sullivan, Kathleen A.
Associate Attorney, Weatherly Law Firm, Atlanta, Georgia.

Swartz, Stanley L.
Professor of Education and Director of the Foundation for California Early Literacy and Learning Program, California State University, San Bernardino, California.

Thurston, Paul W.
Professor, Department of Educational Organization and Leadership, and Director, Office for Professional Development and Public Service, University of Illinois (Urbana-Champaign).

Townley, Art
Professor of Educational Administration, California State University, San Bernardino, California.

Turpin, Joseph O.
Professor of Rehabilitation Counseling, California State University, San Bernardino, California.

Vacca, Richard S.
Professor of Education Law and Senior Fellow, Commonwealth Educational Policy Institute, Virginia Commnwealth University, Richmond, Virginia.

Van Berkum, Dennis W.
Associate Professor of Educational Administration, Minnesota State University-Moorhead, Moorhead, Minnesota.

Wood, R. Craig
B. O. Smith Research Professor, Department of Educational Leadership, The University of Florida, Gainesville, Florida.

Zirkel, Perry A.
Professor of Education and Law, Lehigh University, Bethlehem, Pennsylvania.